TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 346

SOUTHERN CONSTRUCTION COMPANY, INC., ET AL., PETITIONERS,

vs.

SAMUEL J. PICKARD, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 27, 1961

CERTIORARI GRANTED JANUARY 22, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 574

SOUTHERN CONSTRUCTION COMPANY, INC., ET AL., PETITIONERS,

vs.

SAMUEL J. PICKARD, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. A] [File endorsement omitted]

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IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14239

UNITED STATES for use of SAMUEL J. PICKARD d/b/a PICKARD ENGINEERING COMPANY, Appellant

v.

SOUTHERN CONSTRUCTION CO., INC., and CONTINENTAL CASUALTY COMPANY, Appellees.

Appendix to Brief on Behalf of Appellant—
Filed June 24, 1960

[fol. 2]

IN UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

RELEVANT DOCKET ENTRIES

April 4, 1957—Complaint filed

October 16, 1957—Answer of Defendant Continental Casualty Company and Answer with Counterclaim of Defendant Southern Construction Company

November 4, 1957—Plaintiff's Answer to Counterclaim

February 12, 1959—Order setting case for Pre-Trial Hearing On February 27, 1959

June 17, 1959—Plaintiff's Motion for Leave to Amend Complaint

June 17, 1959—Plaintiff's Motion to strike certain portions of the Counterclaim of Defendant Southern Construction Company

June 26, 1959—Plaintiff's Motion for Trial by Jury

July 31, 1959—Pre-Trial Order entered allowing Amendment of Complaint and Amended Complaint filed

July 31, 1959—Plaintiff's Amended Answer to Counterclaim of Defendant filed

August 18, 1959—Amended Answer and Counterelaim of Defendant Southern Construction Company filed

September 16, 1959—Plaintiff's Answer to Defendant's Amended Counterclaim filed

September 25, 1959—Defendant Southern Construction Company Amendment to Counterclaim served in open court

October 1, 1959—Plaintiff's special request and Defendants' general and special request for Instructions to the Jury filed

October 1, 1959—Exception to the charge of the Court filed by Defendants

[fol. 3] October 6, 1959—Questions propounded to the Jury with Answers thereon filed

October 15, 1959—Motion of Defendants for Judgment N.O.V. and for Directed Verdict

November 6, 1959—Order entered requiring each of the parties to submit briefs upon all undisputed matters including Defendants' Motion for Directed Verdict

November 30, 1959—Transcript of part of the Testimony filed

February 29, 1960—Transcript of the Court's statement from the Bench made on February 17, 1960 filed

March 16, 1960—Findings of Fact and Conclusions of Law entered by Judge William E. Miller, filed

March 16, 1960—Order of Judgment in Accordance with Findings of Fact and Conclusions of Law entered by Judge William E. Miller, filed, dismissing Plaintiff's suit and entering Judgment in favor of Defendants, with costs

March 23, 1960—Motion of Plaintiff for Amendment of Findings of Fact and Conclusions of Law under Rule 52-b Federal Rules of Civil Procedure

March 25, 1960—Order denying Plaintiff's Motion for Amending Findings of Fact and Conclusions of Law entered

April 15, 1960—Notice of Appeal filed by Plaintiff

April 15, 1960—Transcript of Portions of the Testimony filed

April 18, 1960—Bond for Cost on Appeal filed by the Plaintiff

May 20, 1960—Bill of Costs filed by Defendant

[fol. 4]

IN UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE, TENNESSEE

Civil Action No. 2357

THE UNITED STATES OF AMERICA for the use of SAMUEL J. PICKARD doing business as PICKARD ENGINEERING COMPANY, 6230 Third Street, Northwest, Washington, D. C., Plaintiff,

v.

SOUTHERN CONSTRUCTION CO., INC., Old Savannah Road Augusta, Georgia, and CONTINENTAL CASUALTY COMPANY, Chicago, Illinois, Defendants.

PRE-TRIAL ORDER—July 31, 1959

This is a suit involving the improvement of ten barracks buildings at Fort Campbell, Tennessee. The prime contractor was defendant Southern Construction Co., Inc., and defendant Continental Casualty Company was its surety, which executed bonds guaranteeing completion of the work and payment of labor and material bills.

The plaintiff was a subcontractor under the prime contractor. He entered into an agreement to perform the plumbing and heating work for a contract price of $50,000.

The Plaintiff brings this suit under the so-called Miller Act (Title 40, U.S.C.A.; Section 270(b)), and the suit is brought not under the express terms of the subcontract, which plaintiff alleges defendants breached, but on a *quantum meruit* basis, under which plaintiff claims the reasonable value of all labor and material furnished by him in the performance of the work.

Defendants deny that any money is due or owing to plaintiff under any theory. They claim that plaintiff did not properly perform its subcontract nor a supplemental [fol. 5] agreement thereto, dated October 7, 1955, both of which govern the obligations and rights of the parties hereto. Defendants further contend that they abided by

the terms of the supplemental agreement and that they were compelled to expend more than the original contract price because the plaintiff abandoned the job without notice and caused the defendants to incur the unnecessary expenses of the work completed by other persons. Defendants insist that they are entitled to recover their losses from the plaintiff under their counter-claim.

Plaintiff claims the supplemental agreement has no application in the case at bar, but even if it otherwise would have application, it was breached in all its important provisions by the defendants. Plaintiff further contends that on a *quantum meruit* basis it is entitled to have (a) the balance due under the express subcontract of $37,000, plus (b) the additional amounts reasonably expended by him in the completion of the work.

Action Taken on Motions

1. Plaintiff was granted the right to amend its complaint within five days from the date of this order, with the understanding that the basic factors supporting the amendment pertaining to *quantum meruit* would be stated. Defendant was granted 20 days from the receipt of the amended complaint to file an Answer.

2. Plaintiff's motion to strike from Defendant's counterclaim all references to the contracts adjudicated by the United States District Court for the Middle District of Georgia, Columbus Division, on March 18, 1959, was granted.

3. Plaintiff's motion to strike from the record certain pending and unanswered interrogatories, filed by defendant under date of February 3, 1959, was granted.

[fol. 6] 4. Plaintiff was granted the right to file an amended Answer to defendant's counterclaim, within five days from the date of this order, so as to include the affirmative defense of *res judicata*.

5. Plaintiff's motion for a jury trial was granted, with the understanding that in lieu of submitting the entire record to the jury, the Court may decide to submit specific questions, depending upon how the evidence develops.

Stipulations

It was stipulated by the parties that all papers contained in the Government files pertaining to the contracts involved in this suit and to this cause of action, would be received in evidence without further proof of their authenticity. Both parties reserve the right to object on any other grounds provided by the usual rules of evidence.

Statement of the Issues

The issues are drawn by the respective contentions of the parties, and these contentions indicate the main issue is whether plaintiff has received the compensation contemplated by the law for the work it performed, and whether the defendants are entitled to recover from plaintiff on their counterclaim.

Incidental issues are whether plaintiff's recovery, if any, should be limited to the balance due under its express contract, or whether due to alleged breaches of the express contract by defendants, plaintiff is entitled to proceed on a *quantum meruit* basis; and, if the latter, what is the proper measure of damage on such a basis.

Evidence pertaining to any other legal questions arising out of a breach of contract, such as mitigation of damage, [fol. 7] or evidence pertaining to issues arising from the statutory provisions of the Miller Act will be admissible.

William E. Miller, United States District Judge.

Trabue, Sturdivant & Harbison, By: Robert C. Taylor, Attorneys for Defendant.

Gracey, Buck, Maddin & Cowan, By: John K. Maddin, Jr., Attorneys for Plaintiff.

July 31, 1959

In United States District Court

Amended Complaint Under the Provisions of Title 40, U.S.C.A., Section 270(b), the Miller Act—Filed July 31, 1959

I. Jurisdiction is based on the provisions of Title 40, U.S.C.A., Section 270(b), the Miller Act.

2. Plaintiff is a solely owned proprietorship with principal offices at 6230 Third Street, Northwest, Washington, District of Columbia; defendant Southern Construction Co., Inc., is a corporation of the State of Georgia, with principal offices at Old Savannah Road, Augusta, Georgia; and defendant Continental Casualty Company is a corporation of the State of Illinois, engaged in the surety or bonding business, with principal offices at Chicago, Illinois.

3. Defendant Southern Construction Co., Inc., entered into a contract with the United States, acting through the Office of the Post Engineer, Fort Campbell, Kentucky-Tennessee, providing for the improvement of 10-74 Man Type Barracks at Fort Campbell, Kentucky-Tennessee, the contract being identified as Contract No. DA-15-056-A [fol. 8] 111-112, and shortly thereafter, on May 5, 1955, defendant Southern Construction Co., Inc., entered into a contract with plaintiff, as a subcontractor, to do all the plumbing and heating work provided for in the specifications of the prime contract, the price of said subcontract being Fifty Thousand Dollars ($50,000.00).

4. Under the terms of the aforesaid subcontract, defendant Southern Construction Co., Inc., was obligated to pay plaintiff for the work as it progressed, and this it failed to do. Instead, defendant Southern Construction Co., Inc., unreasonably and without just cause withheld for unduly long periods of time and still withholds large sums of money which plaintiff had earned, in violation of its payment obligations, thus rendering it impossible for plaintiff to meet its payment obligations to its suppliers, and its labor and materialmen.

5. Although plaintiff made prompt and timely demand for payment, both orally and in writing, full payment of earned money was refused. In an effort to remedy the conditions of financial stress created by these wrongful acts of the defendant, Southern Construction Co., Inc., the parties met on or about the 7th day of October, 1955, with the result that a supplemental agreement was executed on that date. However, said supplemental agreement by its terms applies only to another contract that was simultaneously performed by the parties in Georgia, and the rights of the

parties under said contract were on March 18, 1959, adjudicated by the United States District Court for the Middle District of Georgia, Columbus Division. In any event, the supplement was not effectuated as its provisions were disregarded for all purposes by defendants.

6. Aside from the foregoing failure of defendant Southern Construction Co., Inc., to abide by its contract, plaintiff prosecuted its contract to substantial completion. For so doing it received one progress payment in the amount of Thirteen Thousand Dollars ($13,000.00).

[fol. 9] 7. Except for a few minor details, plaintiff completed its contract work. It became impossible to complete these details because of a virtual abandonment of the prime contract work by defendant. Also, between commencement and completion of plaintiff's work there were extended periods when work was at a virtual standstill due to temporary abandonment of the prime contract work by defendant. These acts, along with the aforesaid failure to make payment constituted breaches of the contract by defendants, entitling plaintiff to relief on a *quantum meruit* basis, said basis to include, among other factors, reimbursement for monies spent on such items, over and above those contemplated by the original contract work, as material, labor, job overhead, general and administrative overhead, tools and supplies, freight, truck expense, and travel expenses.

8. Under date of April 28, 1955, a payment bond in a penal sum of One Hundred and One Thousand Nine Hundred Sixty-seven Dollars and Fifty Cents ($101,967.50) was executed by defendant Southern Construction Co., Inc., as principal, and by defendant Continental Casualty Company as surety, the condition of which bond was that the aforesaid principal and surety would promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the contract hereinbefore described in Paragraph 3 of this Complaint.

Wherefore, the premises considered, plaintiff prays as follows:

1. That process issue out of this Honorable Court directed to each of the defendants, commanding them and

each of them to appear and make answer to this Complaint, and to abide by and perform the orders and decrees of this Court in the premises.

2. That plaintiff be awarded judgment in an amount equal to the reasonable value of the work and services per-
[fol. 10] formed by it, namely, One Hundred Thousand Three Hundred Ten Dollars and eight cents ($100,310.08), with interest and costs.

3. That plaintiff have such other and further relief as the case may require, and to this Court may seem meet and proper.

Gracey, Buck, Maddin & Cowan, By: John K Maddin, Jr., Edward Gallagher, Attorneys for Plaintiff.

Certificate of Service (omitted in printing).

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER AND COUNTERCLAIM OF DEFENDANT, SOUTHERN CONSTRUCTION COMPANY, INC.—Filed August 18, 1959

Comes now the defendant, Southern Construction Company, Inc., and answers the amended complaint, heretofore filed, as follows:

1. Defendant admits the allegations of paragraphs 2, 3, and 8 of the amended complaint.

2. Defendant denies the allegations of paragraphs 1, 4, 5, 6, and 7 of the amended complaint.

Wherefore, defendant prays for judgment and costs.

[fol. 11] Amended Counterclaim

Defendant, Southern Construction Company, Inc., says:

1. Samuel J. Pickard, doing business as Pickard Engineering Company, the real party plaintiff in this cause, defaulted in the performance of the contract as described

in paragraph 3 of plaintiff's amended complaint, and said Samuel J. Pickard failed to perform the covenants and conditions as set forth in said contract in Articles II, III, VI, VIII, X, XII and XIII.

2. Defendant, in fulfillment of its covenants and obligations as prime contractor, was required to complete said work under said Ft. Campbell Contract.

3. Defendant has paid, either to the above named plaintiff or for the account of plaintiff, or has paid the subcontractors or materialmen in order to complete said contracts after abandonment and default by plaintiff the total sum of $57,412.27, which sum is in excess of the contract price of $50,000 on the aforesaid contract, and the plaintiff, Samuel J. Pickard, doing business as Pickard Engineering Company, is indebted to the defendant at the present time for the excess of $7,412.27 pursuant to said contract.

Wherefore, defendant demands judgment against plaintiff, in the sum of $7,412.27 plus interest and costs.

Trabue, Sturdivant & Harbison; Hull, Willingham, Towill & Norman, Attorneys for Defendant and Cross-Plaintiff.

Certificate of Service (omitted in printing).

[fol. 12]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ANSWER TO DEFENDANTS' AMENDED COUNTERCLAIM—Filed September 16, 1959

1. Plaintiff denies the allegations of Paragraphs 1, 2 and 3 of the amended counterclaim.

2. For a further and affirmative defense, Plaintiff states that the amended counterclaim is barred by *res judicata*.

Wherefore, the premises considered, plaintiff requests that the counterclaim be dismissed.

Gracey, Buck, Maddin & Cowan, By: John K. Maddin, Jr., Edward Gallagher, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

QUESTIONS PROPOUNDED TO THE JURY—Filed October 6, 1959

1. Did defendant, Southern Construction Co., Inc., by so conducting its own operations, interfere with the plaintiff Pickard in the performance of his work?
Answer: (No)

2. Did defendant, Southern Construction Co., Inc., fail to pay plaintiff Pickard or the suppliers or materialmen of Pickard as it received payments from the Government for work performed by Pickard?
Answer: (Yes)

3. If you answer either question 1 or 2 Yes, was Plaintiff Pickard induced to leave the work, either by defendant's interfering with his work or by its failure to make payments required by the contract?
Answer: (Yes)

4. What was the reasonable value of all the labor done and all of the materials furnished by plaintiff Pickard [fol. 13] in performance of the sub-contract for plumbing and heating?
Answer: $61,000.00

5. Relative to the payments made by defendant after plaintiff Pickard left the work, were such payments reasonably necessary to complete the work in accordance with the plumbing and heating sub-contract?
Answer: (No)

6. If you answer Question No. 5 No, state the proportionate amount of such payments which were not reasonably necessary to complete the work?
Answer: $4,000.00

[fol. 22]

IN UNITED STATES DISTRICT COURT

JUDGMENT—March 16, 1960

In accordance with the findings of fact and conclusions of law heretofore filed in this case, it is ordered that the plaintiff's suit be and the same is hereby dismissed at the

cost of the plaintiff, and judgment is entered in favor of the defendants. The defendants having waived any claim to affirmative relief, their counterclaim is denied insofar as it seeks judgment against the plaintiff. The attorneys' docket fee is waived.

William E. Miller, United States District Judge.

Approved for entry:

.....

.....

.....

Attorneys for Plaintiff

Trabue, Sturdivant & Harbison
Robt. C. Norman.
Harry S. McCowan
Attorneys for Defendants

[fol. 23]

In United States District Court

Excerpts From Testimony

Excerpts From the Transcript of Testimony of Mr. Baxter, Secy., Southern Constr. Co.

. . . . . .

By Mr. Harbison:

Q. Mr. Baxter, at the time this payment of $35,000 was made, and it bears its own date, August 1956, did you or not instruct your bookkeeper to allocate it to either job, Fort Benning or Fort Campbell?

A. I—I don't think I did.

Q. Why didn't you, Mr. Baxter?

A. Well, it was immaterial to me at the time. It had been such a great length of time from the time we had last seen Pickard until the day we settled finally with Atlas that it was of no concern to me.

Q. You were not concerned with which job it was allocated to at that time?

A. No, sir.

By the Court:

Q. Did Pickard know about this payment being made? Was Pickard notified that you were making the payment?

A. No, sir. He was not notified. I didn't— I did not notify him. Whether Atlas did or not, I don't know, sir. We hadn't heard from Pickard from the time he left us in January until— Well, that was in— I believe the check was in August. We didn't hear from Pickard through August and not until we were notified that we were being sued. I don't know when the first date of suit was.

The Court: All right.

By Mr. Harbison:

Q. Had Mr. Pickard or not already verified to you through his attorney the bills owing at both Atlas and— at Fort Benning and Campbell?

A. He had. Yes, sir.

Q. He had?

A. Certainly.

Q. He had already stated to you that both bills were valid. Is that correct?

A. Yes, sir.

. . . . . .

[fol. 24] Q. All right, sir. Mr. Baxter, at what point of time was any decision made about allocating this payment to the Fort Campbell job as best as you can recall?

A. When we found we had two suits. Originally, there was one suit.

Mr. Grant: Let me understand the question. Did you say at the time it was paid?

Mr. Harbison: I said at what point of time did they make a decision as to allocating the payment to Fort Campbell or attempting to allocate it?

Mr. Grant: If Your Honor please, I want to make this objection: It appearing undisputed in this testimony that there was no allocation at the time of the payment, we object to any evidence of this witness as to any subsequent decision to attempt to allocate it to one or the other on the ground that as a matter of law a debtor in making the payment has the right to designate and allocate it to particular accounts at the time of making the payment, but

that once that time has passed, he has no further control whatsoever over allocation of it as between different accounts. And I have authority I would like to cite Your Honor on that when we get to it, or if Your Honor would like to hear it now. It is clear-cut.

The Court: I think I will hear— As I indicated the other day, I would like to know just how they did handle this. I understand that no allocation was made at the time. In fact, the very release itself shows that, that it is an unallocated item.

Mr. Harbison: Yes, sir. We do not dispute that.

The Court: And they are merely trying to show now that later on they did attempt to do something or other with it, I take it.

Mr. Grant: Yes, sir. And our objection is that they cannot later on, that they must do it at the time of the payment.

The Court: I will hear the evidence for what it is worth.

[fol. 25] By Mr. Harbison:

Q. I am not asking, Mr. Baxter, about bookkeeping. As I understand it, the books still show that it is unallocated. Is that correct?

A. I believe that's correct; yes, sir.

Q. I am not talking about bookkeeping entries.

A. I am not sure.

Q. You are not sure?

A. I am not certain.

Q. Do you have outside auditors or not who come in and handle your books as well as Mrs. Senn?

A. Yes, sir. We do have.

Q. What I am talking about is: Was there ever any decision in your organization (and if so, place it as best you can in point of time) as to claiming the right to allocate the funds to the Fort Campbell contract?

Mr. Gallagher: Your Honor, I think that question is objectionable in that form, whether he claimed the right. It is a question of what did he do.

The Court: I think you might put it this way. At least, here is what I am interested in finding out, and I take it this

is the true picture. Was there ever any decision made to claim it in a counterclaim as against the Fort Benning job as compared with the Fort Campbell job or vice versa? Was there ever any decision made on that one way or the other?

The Witness: When we found we had two suits, then it was necessary to allocate the cost.

By the Court:

Q. Was there ever any decision before you found out about the two suits?

A. No, sir. At that time, it wasn't. It didn't make any difference to me. I was aware— I was aware that the true cost, and it is my opinion and to my knowledge based on information I received from Atlas as to the amount of money that the material they would furnish would cost per barracks up there, and I was concerned with that because we didn't have the protection of a bond, and that's [fol. 26] the way I developed that information. So, inasmuch as the balance due totaled basically the amount of money that Atlas had indicated and Pickard had certified was due, that's the reason I didn't dispute that amount at Fort Campbell.

The Court: All right.

. . . . . .

Q. The Court: Then this decision, as I understand your testimony as far as you are concerned, was a decision made by your attorney representing you?

A. That's correct, sir.

Q. In the course of the litigation after the division was made in the two suits?

A. That's correct. Yes, sir.

Q. To claim it in Tennessee rather than in Georgia?

A. That is correct.

Q. That is your testimony?

A. That is correct.

Q. It is not a bookkeeping decision or an auditing decision or a company decision, but a legal decision?

A. It is a legal decision made by Bob Norman.

Q. All right.

Cross examination.

By Mr. Grant:

Q. And, Mr. Baxter, you say that decision was made immediately after the suit was filed up here, that ever since there has been two suits pending, that decision has been made? Is that your testimony?

A. Mr. Grant— Mr. Grant, shortly— Shortly— I don't know that immediately. When we found that we had two suits up here, then it was allocated by Mr. Norman up here.

Q. Well, now, let's say this suit was filed. Then, how long was the longest time you think elapsed from the time this suit was filed in this court until that decision reached by your attorney as a legal proposition?

A. I don't know the amount of time. I do know that it was well before we appeared in court at Columbus. I know [fol. 27] that it was before Mr. Harbison came over last year, which would be about November. Whenever there was an airplane strike, I recall that as about the time that coincided with Mr. Harbison coming over.

Q. Mr. Baxter, I am asking you now with particular reference to an answer you just gave to His Honor when he asked you a question when you said: "Ever since we have had two suits, the $35,000 has been allocated to Fort Campbell." I believe you made that statement to His Honor?

A. Yes, I believe that is correct.

Q. All right, sir. Now, I want to call your attention to Plaintiff's Exhibit No. 18. Do you recall this affidavit which has been identified as Plaintiff's Exhibit No. 18, it being an affidavit which was executed by you in connection with a motion for summary judgment in the United States District Court for the Middle District of Georgia.

The Court: What is the date of that?

Mr. Grant: The date on it before the Notary Public—

The Witness: (Interrupting) The 17th day of August.

Mr. Grant: August 17, 1958.

By Mr. Grant:

Q. Do you recognize that as—

A. (Interrupting) I recognize my signature; yes, sir.

Q. And that is your signature on that?

A. That is, yes.

Q. I want to direct your attention specifically then to page 4 of that affidavit filed in August 1958, and to first call your attention to the fact that that is one year and four months after the suit was filed in this court, and then direct your attention specifically to the language which says: (Reading)

"Deponent further says that one of the large suppliers of materials for Pickard and Southern in connection with the mechanical work on said job was Atlas Supply Company, and that there existed substantial discrepancies between the amount of materials claimed to have been de-
[fol. 28] livered on the job by Atlas and the amounts actually found to have been delivered on said site upon investigation by Southern, and that this controversy as to the correct amount owed to Atlas continued for a considerable period of time, but resulted finally in a payment by Southern in the sum of $35,000 in full satisfaction of a total claimed invoice by Atlas in the amount of $104,971.12."

Do you recall that statement in the affidavit executed by you?

A. Yes. It reads that way.

Q. And that $104,971.12 was the exact amount of the Atlas bills in connection with Pickard work at Fort Benning?

A. It was claimed to be the actual amount, but it was disputed by me. I don't— I still don't concede that it was the amount.

Q. At any rate, in August of 1958, you executed an affidavit to be filed in that court, in the District Court in Georgia, which said that the $35,000 was paid in full settlement of that disputed bill of Atlas of one hundred and four thousand and somesodd dollars?

A. The check indicates that it was paid in settlement of both accounts, and the reason I paid the check was because I realized that we owed them approximately that much up here at Fort Campbell. Yes.

Q. But the affidavit does not say a word about Campbell, does it?

A. I think it is an affidavit dealing with Campbell.

Q. It is an affidavit dealing with Fort Benning.

A. Fort Benning.

Q. When you are sworn by the Notary Public there, they ask not only for the truth but the whole truth, don't they?

A. I think I gave them the entire truth. Yes, sir.

Q. If you want to contend that that payment was made in settlement of both bills, but you really on your books charged it to Fort Campbell, then that paragraph in there would not state the whole truth, would it?

A. It states that there was a settlement in full for their amount of $104,971.

[fol. 29] The Court: Do I understand that that affidavit was made to support the $35,000 as a part of the counterclaim down there?

Mr. Grant: It was made in connection with a motion for summary judgment.

The Court: I know that, yes.

Mr. Grant: Your Honor, where the point of their motion was, that Pickard had left unjustifiably and that they had spent these great amounts of money in completing this contract including this $35,000 and that, therefore, as a matter of law he could not recover on his plaintiff's suit, that a motion for summary judgment in favor of the defendant as to that should be granted because they had spent these sums far in excess.

The Court: And they were claiming $35,000 as a part of that?

Mr. Grant: Yes, sir. That affidavit there was submitted in connection with that defense, Your Honor.

* * * * * * *

From the Testimony of Robert V. Norman, Counsel for Defendant Southern Construction Co.

Cross examination.

By Mr. Grant:

Q. Mr. Norman, the decision which you reached with reference to this $35,000 item was a decision as to the question in which suit you would assert the $35,000 as a part of your defense? Is that true?

A. Yes. That's substantially true.

Q. In making that decision, you were aware of the fact that you could assert it in the Fort Benning suit?

A. Well, I came to the conclusion that I could better assert it up here.

Q. Well, that was a choice as to which place it would do your client the most good to assert it, wasn't it?

[fol. 30] A. Well, not only that, but it was a choice also as to where I thought we had the best opportunity to make it stick as a definite and correct payment.

Q. You did realize then, and you do now, that the payment involved both jobs, Fort Campbell and Fort Benning?

A. The payment was in satisfaction of a larger amount, yes.

* * * * * * *

By Mr. Grant:

Q. One further question, Mr. Norman: In determining which suit in which you were going to include the $35,000, is it not true that you were to some extent influenced by the fact that up here in this court there was a suit on a contract which was originally $50,000 on which no payments had been made to Pickard or to him and his material men except $13,255.39, and that you had no complete defense to this suit unless you asserted the major part or all of that $35,000 in this suit rather than in Fort Benning, whereas in Fort Benning, you had already asserted the counterclaim which you said entitled your client to substantial recovery against Pickard down there? And did those facts influence you in reaching your decision as to whether to claim it down there or up here?

A. Mr. Grant, when I was trying to decide this issue I was trying to do what was legally correct for my client. I

came to the conclusion that I had the legal right to charge this and to claim this up here, and therefore I did.

Q. Yes, sir. You reached a legal conclusion?

A. I did not include it at Fort Benning.

Q. You reached the legal conclusion that you were free to change the court in which you would assert it according to the best interests of your clients that would thereby be served?

A. No. I didn't reach any such legal conclusion as that. I reached the conclusion that since a separate suit had been filed by the plaintiff and since there had been materials furnished up here of $34,520, I had a right to claim [fol. 31] that we had paid for those materials as a matter of law.

Q. Well, after having written that letter in April 1957, saying that you were unable to allocate it, that it was a lump-sum overall settlement, it wasn't until a week before this trial began that you finally wrote a letter to try to change that and to say, "We are now going to allocate it up here at Fort Campbell," was it?

A. You all knew when we argued this summary judgment in August of 1958 that we were not claiming this $35,000 down there. The only reason I wrote—

Q. (Interrupting) I don't know. I mean from these exhibits— They were changed from time to time, weren't they?

A. They were changed from time to time, but you could know from the counterclaim, from the affidavits we filed in connection with the counterclaim what we were claiming down at Fort Benning in August of 1958.

Q. You were present and heard me ask the question, and made no objection to it when I asked Mrs. Segn if they paid that $35,000 and if it was any obligation of Mr. Pickard, it was a part of this counterclaim, wasn't it; and you heard her give the answer that that payment was in settlement of both bills, Fort Benning and Fort Campbell?

A. Yes, sir; but she didn't say it was part of that counterclaim. She said it was in settlement of two accounts. Mr. Baxter said that it was not a part of that claim. And you never asked for the check, you never demanded the voucher, and you never demanded that it be put in down there.

. . . . . .

From the Testimony of Mr. Baxter

By Mr. Harbison:

Q. Let me ask you, though, did you or not make any payment to Atlas during 1955, and if not, why not, after the October 7th agreement?

A. Well, we— We never were given proper credit for [fol. 32] payments made, and Atlas was charging us for approximately $52,000 worth of money they had advanced to Pickard that we had made a joint payment to Atlas and Pickard.

Q. Was there some controversy about that?

A. There was a controversy; yes, sir. They refused to give us credit, and we contended we didn't owe—

By the Court:

Q. Who refused to give you credit?

A. Atlas Supply Company failed to give us credit.

By Mr. Harbison:

Q. That was really on another—

Mr. Gallagher: Your Honor, this was covered in his previous testimony.

Mr. Harbison: Not before the jury, if the Court please. I am about through.

The Court: All right.

Mr. Harbison. The jury has not understood any of this.

By Mr. Harbison:

Q. Was there really any dispute particularly about the Fort Campbell billing that you had with Atlas?

A. No; no. We acknowledged that we owed Atlas the $34,520 because it had been certified by Mr. Pickard and Atlas as being owed up there.

Q. But you had a dispute with this same supplier in connection with another contract?

A. Yes, sir; a substantial dispute.

Q. All right. Thank you.

The Court: Cross-examine.

Cross examination.

By Mr. Grant:

Q. Mr. Baxter, you say there was no dispute about the Fort Campbell bill of Atlas?

A. No, sir.

[fol. 33] Q. You admit that it was $47,000-and-some-odd worth of material delivered, and that you had made a payment of $13,000, and had gotten credit for it on the Fort Campbell account?

A. I didn't—I didn't admit that there was $47,000 due them. I admitted that the $34,520 was certified to me as correct balance to Atlas at Fort Campbell by Pickard, was payable by me.

Q. Then that bill of Atlas was not in dispute. That is all I want to establish.

A. Yes, sir. No. That bill at Fort Campbell was not in dispute. No, sir.

Q. Your sole reason for not paying a dime at Fort Campbell is on account of some dispute that you had about a bill down at Fort Benning on the contracts down there?

A. Right, where they failed to give me credit for $52,000 worth of payments I had made to Pickard Engineering, including $13,000 at Fort Campbell.

Q. Well, there has been a lawsuit about that.

A. Well, it developed in there that that was the truth.

Q. But your reason for not making any payment up here was solely on account of the fact that there was some dispute in your mind about the bill down at Fort Benning, and you wanted to treat the whole thing as a one-package deal, one transaction, and not pay anything up here because you were disputing down there.

A. No. That's incorrect, sir. I was willing to pay them any time that I got proper credit. I was willing to pay them on this up here.

Q. But you were not willing to pay them on the Fort Campbell job until you got the Fort Benning job straightened out to your satisfaction, were you?

A. Due to the fact that they had not given me credit for $52,000 worth of checks, including $13,000 up here.

Q. That is true, isn't it, that you were not willing to make any payment to Fort Campbell until you were perfectly satisfied at Fort Benning?

A. Yes, sir.

Mr. Grant: That's all.

(Witness excused.)

[fol. 34]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT NO. 32

LAW OFFICES
HULL, WILLINGHAM, TOWILL & NORMAN
AUGUSTA, GA.

Augusta, Georgia, April 15, 1957.

Re: Pickard Engineering Company vs.
Southern Construction Co., Inc., et al.
Civil Action No. 652.

Mr. Edward Gallagher, Attorney at Law,
Suite 400, Wyatt Building,
Washington 5, D. C.

Dear Mr. Gallagher:

Pursuant to your request of April 1, 1957, we have endeavored to furnish herewith the data as outlined in your letter. We could not in all instances furnish the information exactly as you requested it:

1. A copy of the Letter of Agreement for the completion of Pickard's work at Fort Benning, Georgia, is enclosed in Folder marked #1.

2. Copies of the monthly estimates prepared and submitted by Southern in connection with the Fort Benning jobs and the Fort Campbell job subsequent to October 7, 1955, are enclosed in Folder #2. These papers are somewhat difficult to interpret due to the fact that in some instances the Government prepared a revised estimate and in other instances they simply deducted certain amounts

from our estimates. As to Fort Benning, we do not have in the files of Southern the estimates which were submitted by our superintendent of construction in the field. The only thing we have in our files is the payment estimate which was approved and paid by the Government and which accompanied the check in each instance.

[fol. 35] 3. Copies of the monthly estimates approved by the Government are enclosed under 2 above.

4. Copies of all invoices, bills, et cetera, paid by Southern subsequent to October 7, 1955, are enclosed in Folder #3. The invoices for the three Fort Benning jobs are all combined, since we could not tell in many instances to which job these invoices should be applied. We do not have an invoice covering the heaters and freight charges applicable thereto, since they were paid on our petty cash account, but Mr. Pickard is fully familiar with these items since c. o. d. payment was required at Columbus, which we advanced with his approval.

Included in the Fort Benning invoices is our Voucher No. 9715, dated August 27, 1956, payable to Atlas Supply Company in the amount of $35,000.00, in full satisfaction for all materials delivered to both Fort Benning and Fort Campbell jobs. This was an over-all lump sum settlement, and we are unable to allocate this amount as between Fort Campbell and Fort Benning.

We will greatly appreciate your furnishing to us as promptly as practicable and prior to our hearing the information and papers which we requested in our letter.

Very truly yours,

HULL, WILLINGHAM, TOWILL & NORMAN,

By ROBERT C. NORMAN
Robert C. Norman.

N:W

ENCLOSURES.

Copy to:

Southern Construction Co., Inc.,
Old Savannah Road,
Augusta, Georgia.

[fol. 36]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT No. 6

September 14, 1959

Mr. Edward Gallagher,
1216 Wyatt Building,
Washington 5, D. C.

Mr. John K. Maddin, Jr.,
434 Stahlman Building,
Nashville 3, Tennessee

Re: The United States of America
for the use of Samuel J. Pickard,
doing business as Pickard Engineering
Company, 6230 Third Street, Northwest,
Washington, D. C., Plaintiff

vs.

Southern Construction Co., Inc.,
Old Savannah Road, Augusta, Georgia,

and

Continental Casualty Company,
Chicago, Illinois, Defendants

In the United States District Court for the
Middle District of Tennessee, Nashville Division
Civil Action No. 2357

Gentlemen:

On April 15, 1957, I wrote to Mr. Gallagher in behalf of Southern Construction Company, furnishing to you at your request certain information and papers relative to the account of S. J. Pickard, doing business as Pickard Engineering Company, in connection with work performed by him as subcontractor at Fort Benning, Georgia, and Fort Campbell, Kentucky.

As you know, Atlas Supply Company was the primary supplier at both Fort Campbell and Fort Benning.

On page two of my letter of April 15, 1957, I wrote you as follows:

> "Included in the Fort Benning invoices is our invoice #9716, dated August 27, 1956, payable to Atlas Supply Company in the amount of $35,000, in full satisfaction for all materials delivered to both Fort Benning and Fort Campbell jobs. This was an overall lump [fol. 37] sum settlement and we are unable to allocate this amount as between Fort Campbell and Fort Benning."

At the time of my letter of April 15, 1957, the bookkeeper for Southern had not received all of the copies of the statements from Atlas Supply Company to Pickard concerning this account, and we had not completed our analysis of the entire account both at Fort Campbell and at Fort Benning as to the legal position of Southern.

This is, therefore, to confirm the previous statements made orally by telephone to Mr. George Grant, who, I understand is now associated with you as counsel in this proceeding, some weeks ago that Southern had now received statements from Atlas for materials furnished to Fort Campbell in the total amount of $34,520.94; that we also ascertained that Mr. Pickard had verified this amount to be the correct amount for materials actually furnished to Fort Campbell; that no part of this amount had been claimed or set up in the cross-claim of Southern in the suit therein pending between Pickard and Southern in the United States District Court for the Middle District of Georgia, Columbus Division; and that Southern was and is entitled to an accounting for the full amount paid by it and chargeable to the Fort Campbell job for materials actually delivered to said job, and that said amount of $34,520.94 is being claimed by Southern in the suit now pending in the Nashville Division of the United States District Court for the Middle District of Tennessee, as

shown in the caption of this letter, and that Pickard is liable to Southern for this amount in said proceeding.

Yours very truly,

HULL, WILLINGHAM, TOWILL & NORMAN,

By ROBERT C. NORMAN.

RCN-V

Blind copy:
Mr. Harry S. McCowen,
1111 Hurt Building,
Atlanta, Georgia

Mr. Wm. J. Harbison,
Trabue, Sturdivant & Harbison,
26th Floor - Life & Casualty Tower,
Nashville 3, Tennessee

(Face)

SOUTHERN CONSTRUCTION CO., INC.
GENERAL CONTRACTORS
AUGUSTA, GEORGIA

(N.P. 6649)

PAY TO THE ORDER OF	CHECK NO.	GROSS	DISCOUNT	DATE	AMOUNT
Atlas Supply Company	3046	35,000.00		Aug. 28 56	35,000.00

NOT VALID AFTER 90 DAYS

PAY

TO The Citizens & Southern National Bank
AUGUSTA, GEORGIA

★35000 00

SOUTHERN CONSTRUCTION CO., INC.
BY J. W. Prather
BY Mary L. Lewis

(Reverse)

Atlas Supply Company

[fol. 38]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT 22

[fol. 39] Release of All Claims

For and in consideration of the payment by Southern Construction Co., Inc. of the sum of $35,000.00, the receipt of which is hereby acknowledged the Undersigned, Atlas Supply Company does hereby release, satisfy and discharge Southern Construction Co., Inc., its agents and employees from and against any and all claims of whatsoever kind or character, which claims are disputed and denied, arising out of, or in any way connected with, or which might arise hereafter out of, the rehabilitation of Barracks, Mess Halls and Bachelor Officer's Quarters at Fort Campbell, Kentucky, and Fort Benning, Georgia under contracts with the U. S. Army, on which contracts Southern Construction Co., Inc. was Prime Contractor and S. J. Pickard doing business as Pickard Engineering Company was Sub Contractor.

Without limiting the generality of the foregoing, this release shall apply to any and all liability or obligation of Southern Construction Co., Inc. for any and all materials furnished by the Undersigned to Pickard Engineering Company, or to Southern Construction Co., and the Undersigned represents and warrants that materials satisfactory for use in connection with said jobs have been furnished and delivered to said jobs in the amount paid hereunder by Southern Construction Co., Inc., and the Undersigned although fully releasing Southern Construction Co., Inc. from any and all claims whatsoever hereby reserves its rights to proceed against S. J. Pickard, doing business as Pickard Engineering Company, for any additional sums. Southern Construction Co., Inc. specifically reserves its rights under its sub contracts with S. J. Pickard, doing business as Pickard Engineering Company.

In witness whereof the Undersigned, Atlas Supply Company has hereunto set its official hand and seal by its duly authorized officers.

ATLAS SUPPLY COMPANY

By: W. MURRAY
Its duly authorized Officer:
Executive Vice-President

Signed, Sealed and Delivered in the Presence of

NEWFIELD BLACKWELL
NELLY ROBERTSON
Notary Public

[fol. 40]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT NO. 15

Filed at 4:45 P.M. Dec. 26 1956

Civil Action No. 652

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA COLUMBUS DIVISION

THE UNITED STATES OF AMERICA for the use of SAMUEL J. PICKARD doing business as PICKARD ENGINEERING COMPANY, 6230 Third Street, Northwest, Washington, D. C., Plaintiff,

v.

SOUTHERN CONSTRUCTION CO., INC., Old Savannah Road, Augusta, Georgia, and CONTINENTAL CASUALTY COMPANY, Defendants.

COMPLAINT ON A PAYMENT BOND FOR MONEY DAMAGES UNDER THE PROVISIONS OF TITLE 40, U.S.C.A., SECTION 270 (b), THE MILLER ACT

1. Jurisdiction is based on the provisions of Title 40, U.S.C.A., Section 270 (b), the Miller Act.

2. Plaintiff is a solely owned proprietorship with principal offices at 6230 Third Street, Northwest, Washington, District of Columbia; defendant Southern Construction Co., Inc., is a corporation of the State of Georgia, with principal offices at Old Savannah Road, Augusta, Georgia, and defendant Continental Casualty Company is a corporation of the State of Illinois, engaged in the surety or bonding business, with principal offices at Chicago, Illinois.

3. Defendant Southern Construction Co., Inc., entered into a contract with the United States, acting through the Office of the Post Engineer, Fort Benning, Georgia, providing for the Improvement of 89 Mobilization Type Barracks at Fort Benning, the contract being identified as Contract No. DA-09-038-A111-669, and shortly thereafter, on May [fol. 41] 5, 1955, defendant Southern Construction Co., Inc., entered into a contract with plaintiff, as a subcontractor, to do all the plumbing and heating work provided for in the specifications of the *prime contract, the price of said subcontract* being Four Hundred Thirty Thousand Dollars ($430,000.00).

4. Said defendant entered into another contract with the United States, as aforesaid, providing for Improvement of 4 Mobilization Type Bachelor Officers' Quarters at Fort Benning, Georgia, said contract being identified as Contract No. DA-09-038-A111-673, and shortly thereafter, on May 5, 1955, defendant Southern Construction Co., Inc., entered into a subcontract with plaintiff to do all the plumbing and heating work provided for in the specifications of the prime contract, the contract price of the subcontract being Twenty-six Thousand Dollars ($26,000.00).

5. Said defendant entered into another contract with the United States, as aforesaid, providing for Improvement of 17 Temporary Type Mess Halls at Fort Benning, Georgia, said contract being identified as Contract No. DA-09-038-A-111-672, and shortly thereafter, on May 5, 1955, defendant Southern Construction Co., Inc., entered into a subcontract with plaintiff to do all the plumbing and heating work provided for in the specifications of the prime contract, the contract price of the subcontract being Forty-five Thousand One Hundred Dollars ($45,100.00).

6. Said defendant entered into another contract with the United States, acting through the Office of the Post Engineer, Fort Campbell, Kentucky, providing for the Improvement of 10-74 Man-Type Barracks at Fort Campbell, Kentucky, the contract being identified as Contract No. DA-15-056-A111-112, and shortly thereafter, on May 5, 1955, defendant Southern Construction Co., Inc., entered into a contract with plaintiff, as a subcontractor, to do all the [fol. 42] plumbing and heating work provided for in the specifications of the prime contract, the price of said subcontract being Fifty Thousand Dollars ($50,000.00).

7. Under the terms of the aforesaid subcontracts, defendant Southern Construction Co., Inc., was obligated to pay plaintiff for the work as it progressed, and this it failed to do. Instead, defendant Southern Construction Co., Inc., unreasonably and without just cause withheld for unduly long periods of time large sums of money which plaintiff had earned, in violation of its payment obligations, thus rendering it impossible for plaintiff to meet its payment obligations to its suppliers, and its labor and materialmen.

8. Although plaintiff made prompt and timely demand for payment, both orally and in writing, full payment of earned money was refused. In an effort to remedy the conditions of financial stress created by these wrongful acts of the defendant Southern Construction Co., Inc., the parties met on or about the 7th day of October, 1955, with the result that a Supplemental Agreement was executed on that date providing, among other things, that said defendant would release to plaintiff sufficient money to meet its payrolls each week, up to a stated maximum, and providing further that said defendant would pay directly all suppliers and materialmen whose bills plaintiff certified to be correct. Defendant Southern Construction Co., Inc., wholly failed to meet its obligations under the aforesaid Supplemental Agreement in that it failed to pay suppliers and materialmen in any substantial amounts.

9. Under date of April 30, 1955, a payment bond in a penal sum of Four Hundred Ninety-six Thousand One Hundred Thirty-one Dollars ($496,131.00) was executed by defendant Southern Construction Co., Inc., as principal, and

by defendant Continental Casualty Company as surety, the condition of which bond was that the aforesaid principal and surety would promptly make payment to all persons [fol. 43] supplying labor and material in the prosecution of the work provided for in the contract hereinbefore described in Paragraph 3 of this Complaint.

10. Under date of May 16, 1955, a payment bond in a penal sum of Fifty-nine Thousand Seven Hundred Dollars ($59,700.00) was executed by defendant Southern Construction Co., Inc., as principal, and by defendant Continental Casualty Company as surety, the condition of which bond was that the aforesaid principal and surety would promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the contract hereinbefore described in Paragraph 4 of this Complaint.

11. Under date of May 9, 1955, payment bond was executed in a penal sum of Seventy-four Thousand Six Hundred Sixty-eight Dollars and Fifty Cents ($75,668.50) by defendant Southern Construction Co., Inc., as principal, and by defendant Continental Casualty Company as surety, the condition of which bond was that the aforesaid principal and the surety would promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the contract hereinbefore described in Paragraph 5 of this Complaint.

12. Under date of April 28, 1955, a payment bond in a penal sum of One Hundred and One Thousand Nine Hundred Sixty-seven Dollars and Fifty Cents ($101,967.50) was executed by defendant Southern Construction Co., Inc., as principal, and by defendant Continental Casualty Company as surety, the condition of which bond was that the aforesaid principal and surety would promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the contract hereinbefore described in Paragraph 6 of this Complaint.

[fol. 44] 13. There was earned by plaintiff under said contracts the sum of One Hundred Twenty Thousand Dollars ($120,000.00) which remains unpaid by defendant Southern Construction Co., Inc.

WHEREFORE, the premises considered, plaintiff prays as follows:

1. That process issue out of this Honorable Court directed to each of the defendants, commanding them and each of them to appear and make answer to this Complaint, and to abide by and perform the orders and decrees of this Court in the premises.

2. That plaintiff be awarded judgment against defendants in the amount of One Hundred Twenty Thousand Dollars ($120,000.00), with interest and costs.

3. That plaintiff have such other and further relief as the case may require, and to this Court may seem meet and proper.

F. BALDWIN MARTIN
GEORGE C. GRANT
Attorneys for Plaintiff

Of Counsel:
MARTIN, SNOW & GRANT
503 First National Bank Building
Macon, Georgia

We, the Jury, find in favor of the Plaintiff $24,369.40. March 14, 1959.

/s/ W. S. MAXWELL
Foreman

Filed at M
Mar 14 1959
H. OAKY PARKER,
Deputy Clerk
U. S. District Court

[fol. 45]

Filed at 1:57 P.M. Jan 31 1957

ANSWER OF DEFENDANT, CONTINENTAL CASUALTY COMPANY

Comes now the defendant, Continental Casualty Company, and answers the complaint as follows:

1. In so far as defendant may legally do so, it admits jurisdiction as alleged in paragraph 1 of plaintiff's complaint.

2. Defendant admits the allegations of paragraphs 2, 3, 4, 5, 6, 9, 10, 11, and 12 of plaintiff's complaint.

3. Defendant denies each and every allegation of paragraphs 7, 8, and 13 of plaintiff's complaint.

WHEREFORE, defendant prays for judgment and costs.

HULL, WILLINGHAM, TOWILL & NORMAN,

By ROBERT C. NORMAN
Robert C. Norman

P. O. Address:
Suite 1013 Southern Finance
Bldg., Augusta, Ga.

YOUNG & HOLLIS
By HOWELL HOLLIS
Howell Hollis
Attorneys for Defendant,
Continental Casualty
Company

P. O. Address:
Professional Bldg.,
Columbus, Ga.

I, Robert C. Norman, of Counsel for Continental Casualty Company, one of the defendants in the above entitled cause, do hereby certify that I have served the plaintiff, Samuel J. Pickard, doing business as Pickard Engineering Company, with a copy of the foregoing answer by mailing a copy of the same postpaid to his counsel of record, Messrs. [fol. 46] Martin, Snow & Grant, at their Post Office address designated of record, to-wit, 503 First National Bank Building, Macon, Georgia.

This 30 day of January, 1957.

ROBERT C. NORMAN
Of Counsel for the Defendant,
Continental Casualty Company

Filed at 1:57 P.M. Jan 31 1957

ANSWER AND COUNTERCLAIM OF DEFENDANT, SOUTHERN CONSTRUCTION CO. INC.

Comes now the defendant, Southern Construction Co., Inc., and answers the complaint as follows:

1. In so far as defendant may legally do so, it admits jurisdiction as alleged in paragraph 1 of plaintiff's complaint.

2. Defendant admits the allegations of paragraphs 2, 3, 4, 5, 6, 9, 10, 11, and 12 of plaintiff's complaint.

3. Defendant denies each and every allegation of paragraphs 7, 8, and 13 of plaintiff's complaint.

WHEREFORE, defendant prays for judgment and costs.

COUNTERCLAIM

Defendant, Southern Construction Co., Inc., says:

1. Samuel J. Pickard, doing business as Pickard Engineering Company, the real party plaintiff in this cause, defaulted in the performance of each of the contracts described in paragraphs 3, 4, 5, and 6 of plaintiff's complaint, and failed to perform the covenants and conditions as set forth in said contracts in Articles II, III, VI, VIII, IX, XII, and XIII of each of said contracts.

[fol. 47] 2. Defendant, in fulfilment of its covenants and obligations as prime contractor, was required to complete said work under each of said contracts.

3. Defendant has paid, either to the above named plaintiff or for the account of plaintiff, or has paid to subcontractors and materialmen in order to complete said contracts after default by the plaintiff, the total sum of $638,170.19, which sum is in excess of the aggregate contract price of $551,351.56 of all four of said contracts as described in paragraphs 3, 4, 5, and 6 of plaintiff's complaint, and the plaintiff, Samuel J. Pickard, doing business as Pickard Engineering Company, is indebted to this defendant at the present time for the excess of $86,818.63.

WHEREFORE, defendant demands judgment against plaintiff, Samuel J. Pickard, doing business as Pickard Engineering Company, in the amount of Eighty-six Thousand Eight Hundred Eighteen and 63/100 Dollars ($86,818.63) plus interest and costs.

HULL, WILLINGHAM, TOWILL & NORMAN,

By ROBERT C. NORMAN
Robert C. Norman

P. O. Address:
Suite 1013 Southern
Finance Building
Augusta, Georgia

YOUNG & HOLLIS

By HOWELL HOLLIS
Howell Hollis
Attorneys for Defendant,
Southern Construction
Co., Inc.

P. O. Address:
Professional Bldg.,
Columbus, Georgia

[fol. 48] I, Robert C. Norman, of Counsel for Southern Construction Co., Inc., one of the defendants in the above entitled cause, do hereby certify that I have served the plaintiff, Samuel J. Pickard, doing business as Pickard Engineering Company, with a copy of the foregoing answer and counterclaim by mailing a copy of the same postpaid to his counsel of record, Messrs. Martin, Snow & Grant, at their Post Office address designated of record, to-wit: 503 First National Bank Building, Macon, Georgia.

This 30 day of January, 1957.

ROBERT C. NORMAN
Of Counsel for the Defendant,
Southern Construction Co.,
Inc.

AMENDED COMPLAINT

Now comes plaintiff and with leave of court amends the complaint by adding between paragraphs 12 and 13 new paragraphs to be known as 12(a), 12(b) and 12(c) as follows:

12(a)—Defendant Southern Construction Co., Inc. failed to comply with said supplemental Agreement of October 7, 1955 in that it wholly failed to pay either to plaintiff or jointly to plaintiff and subcontractors and material men as it was paid on requisition which included labor and for material furnished by such subcontractors and or material men.

12(b)—Further, said defendant wrongfully rescinded said contracts and said supplemental Agreement of October 7, 1955 in that, while Plaintiff was still engaged in performing said contracts, said defendant contracted and agreed with another subcontractor, mechanical contractors, to take over and complete the work remaining to be performed by plaintiff under said contracts.

[fol. 49] 12(c)—By reason of the breach of said contract by defendant as aforesaid and said defendant's unlawful and wrongful rescission of said contracts, plaintiff is entitled to recover in this action the reasonable value of the work performed by plaintiff, which plaintiff alleges was $162,071.16 in excess of payments made to plaintiff or on his behalf by defendant Southern Construction Co.

Wherefore, plaintiff prays that this amendment be allowed.

GEORGE C. GRANT
George C. Grant

EDWARD GALLAGHER
Edward Gallagher
Attorneys for Plaintiff

The foregoing amendment is hereby allowed this 9th day of March, 1959.

W. A. BOOTH
W. A. Booth
United States Judge

I have this day served the foregoing amendment on defendants by handing copy in person to Howell Hollis, their attorney.

This 9th day of March, 1959.

GEORGE C. GRANT

Filed at 3:30 P.M. Mar. 11, 1957

PLAINTIFF'S ANSWER TO COUNTERCLAIM

1. Plaintiff denies the allegations of Paragraph 1 of the Counterclaim.

2. Plaintiff has no knowledge upon which to admit or deny the allegations of Paragraph 2 of the Counterclaim, and demands strict proof thereof.

[fol. 50] 3. Plaintiff has no knowledge upon which to admit or deny the accuracy of the figures contained in Paragraph 3 of the Counterclaim. It denies that plaintiff was ever in default under the contracts; or that plaintiff is indebted to defendants in any amount.

WHEREFORE, the premises considered, plaintiff requests that the Counterclaim be dismissed.

GEORGE C. GRANT
George C. Grant
Martin, Snow & Grant
503 First National Bank Bldg.
Macon, Georgia

EDWARD GALLAGHER
Edward Gallagher
1216 Wyatt Building
Washington 5, D. C.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that copy of the within Answer to Counterclaim has been served by mailing (first-class mail) a copy thereof this 11 day of March, 1957, to Robert C.

Norman, Esquire, 1013 Southern Finance Building, Augusta, Georgia, and Howell Hollis, Esquire, Professional Building, Columbus, Georgia, attorneys for defendants.

GEORGE C. GRANT
George C. Grant

PRE-TRIAL STATEMENT

A. ISSUES

This is a suit under the Miller Act (Title 40 U.S.C.A., Section 270).

The plaintiff contends that each of the three subcontracts with the defendant at Fort Benning was breached by [fol. 51] Southern Construction Co., Inc. in that payments were not made in accordance with said contracts. Plaintiff also contends that these contracts were breached by Southern Construction Co., Inc. when it removed plaintiff from the contract work contracting with another contractor for its completion. Plaintiff also contends that these contracts were breached by undue interference by Southern Construction Co., Inc. with the contract work of plaintiff. Defendants contend that the plaintiff's contentions in the last two sentences are not properly involved in this case. Defendants further contend that there was no material breach of the contracts by the defendant but that the contracts were breached by the plaintiff prior to their completion and that it became defendant's right under the contracts to complete each of said contracts.

Plaintiff further contends that it is entitled to damages for breach of contract on a quantum meruit basis, and that evidence of any actions of Southern Construction Co., Inc., contributing to plaintiff's costs, should be considered in arriving at the measure of damages. Defendants contend that evidence of Southern Construction Co., Inc. contributing to plaintiff's costs should not be considered.

It is the defendants' position that there was no material breach by defendant Southern Construction Co., Inc. and, if there was none, the plaintiff is liable over to the defendant Southern Construction Co., Inc. on its counterclaim for

the excess costs of completing the work which defendant contends was abandoned by the plaintiff. Defendants also contend that plaintiff breached the contracts in failing to complete the work in accordance with the contracts.

B. Pleadings

Subsequent to the filing of the original complaint, it has become apparent that this Court has no jurisdiction over controversies growing out of the Fort Campbell, Kentucky [fol. 52] contract referred to in paragraph 6 and 12 of the complaint. Plaintiff requests that the complaint be amended by striking out those two paragraphs. Plaintiff requests that the complaint be further amended by striking the last six lines of paragraph 8, and substituting the following:

> ". . . defendant would pay either jointly to Pickard and to subcontractors or materialmen, or to Pickard, as Southern is paid on requisitions which include labor and/or material furnished by such subcontractors and/or materialmen. Defendant, Southern Construction Co., Inc., wholly failed to meet its foregoing obligations under the aforesaid Supplemental Agreement."

Plaintiff also requests that the complaint be amended by striking out paragraph 13 of the complaint and paragraph 2 of the prayers, and by substituting for paragraph 13 the following:

> "13. There was expended by plaintiff in the performance of said contracts the sum of One Hundred Sixty-two Thousand Seventy-one and 16/100 ($162,071.16) Dollars, which remains unpaid by defendant Southern Construction Co., Inc."

And that there be substituted for paragraph 2 of the prayers, the following:

> "2. That plaintiff be awarded judgment against defendants on a quantum meruit basis the sum of One Hundred Sixty-two Thousand Seventy-one and 16/100 ($162,071.16) Dollars, with interest and costs."

Defendant Southern Construction Co., Inc. desires to amend paragraph 3 of its counterclaim by substituting the following:

"3. Defendant has paid, either to the above named plaintiff or for the account of plaintiff, or has paid [fol. 53] to subcontractors and materialmen in order to complete said contracts after default by the plaintiff, the total sum of $580,511.41, which sum is in excess of the aggregate contract price of $508,511.41 of all four of said contracts as described in paragraphs 3, 4, 5, and 6 of plaintiff's complaint, and the plaintiff, Samuel J. Pickard, doing business as Pickard Engineering Company, is indebted to this defendant at the present time for the excess of $72,061.78."

Defendant Southern Construction Co., Inc. also desires to amend the prayer of its counterclaim by substituting the words and figures "Seventy-two Thousand Sixty-one and 78/100 ($72,061.78) Dollars" in place of the words and figures "Eighty-six Thousand Eight Hundred Eighteen and 63/100 ($86,818.63) Dollars."

The parties agree that the foregoing requests for amendment may be treated as formal amendments tendered to the Court.

The defendant objects to and moves to strike the proposed amendment to Paragraph 13 of the complaint on the ground that the same does not set forth a proper measure of damages in this action.

C. Documentary Evidence

It is stipulated that the following documents be received in evidence without further proof of their authenticity:

1. Original or copies of the prime contracts between Southern Construction Company and the Government, being Contracts Nos. BA-09-038-A 111-669, DA-09-038-A 111-672, and DA-09-038-A 111-673.

2. The subcontracts, or copies thereof, between Southern Construction Company and Pickard Engineering Company as to each of said jobs under the prime contracts.

[fol. 54] 3. The supplemental agreement or amendment as to each of the subcontracts, dated October 7, 1955, between Southern Construction Company and Pickard Engineering Company, and the addendum thereto.

D. Stipulations

1. That this suit was brought not later than one year from the date of final settlement of each of said contracts between Southern and the Government at Fort Benning.

2. That the total combined contract price for the three contracts at Fort Benning, Georgia was $513,075.11 as of January 17, 1956, and of this amount there was paid by defendant Southern Construction Co., Inc. to plaintiff or in his behalf the total sum of $431,925.90 prior to January 17, 1956. (Defendant contends that the final contract price was $509,646.96, but this figure is not stipulated.)

3. That defendant Southern Construction Co., Inc., pursuant to the agreement of October 7, 1955, advanced for labor under the terms of said agreement of October 7, 1955 and prior to January 13, 1956, a sum in excess of $60,000.00 exclusive of the payroll of January 13, 1956.

E. Limitation of Issues for the Jury

The facts to be adduced before the jury will be limited to those bearing on the following issues:

1. The plaintiff contends that the issue as to payments by Southern Construction Co., Inc. to or for plaintiff should be stated as follows: "Whether Southern Construction Co., Inc. made payments to plaintiff in strict accordance with its contracts dated May 5, 1955, as amended by a supplemental contract dated October 7, 1955." The defendant contends that such issues should be "Whether Southern Construction Co., Inc., after October 7, 1955, made payments to plaintiff in substantial accordance with its con- [fol. 55] tracts dated May 5, 1955, as amended by the supplemental contract dated October 7, 1955."

2. The plaintiff contends that the issue as to breach of contract by Southern Construction Co., Inc. should be

"Whether Southern Construction Co., Inc. materially breached the aforesaid contracts by (a) failing to abide by the payment provisions; (b) by improperly ejecting plaintiff from the work by the substitution of another contractor; and (c) by unduly interfering with the contract work of plaintiff. Defendant contends that this issue should be confined as follows: "Whether Southern Construction Co., Inc. materially breached the aforesaid contracts by failing to abide by the payment provisions thereof."

3. The compensation, if any, to which plaintiff is entitled on a quantum meruit basis, should the jury find for the plaintiff. On this issue, the plaintiff contends that evidence pertaining to increased costs of plaintiff resulting from acts of Southern Construction Co., Inc. should be deemed relevant to this issue. The defendant contends that such evidence is improper and that evidence as to the compensation, if any, to which plaintiff is entitled should bear on the question of the fair market value of labor and materials incorporated in the work by plaintiff.

4. It is the defendant's contention that the plaintiff abandoned the work without justification, and it is the plaintiff's contention that he did not abandon the work but temporarily suspended operations and was replaced without just cause. The issue is which of these contentions is correct.

5. It is the defendant's further contention that there was no material breach of the contracts by defendant sufficient to excuse further performance and completion of the work by Pickard. The issue is whether or not this contention is correct.

[fol. 56] 6. It is the defendant's further contention that Pickard failed to complete the work in accordance with the contracts as amended and that he had no adequate excuse for such failure to complete. The issue is whether or not this contention is correct.

7. The compensation, if any, to which the defendant Southern Construction Co., Inc., is entitled on its counter-

claim, in the event the jury finds that the defendant acted within its rights in taking over and completing the work.

Respectfully submitted,

MARTIN, SNOW, GRANT & NAPIER

By GEORGE C. GRANT
George C. Grant

EDWARD GALLAGHER
Edward Gallagher
1216 Wyatt Building
Washington 5, D. C.
Attorneys for Plaintiff

HULL, WILLINGHAM, TOWILL & NORMAN

By .....
Robert C. Norman

YOUNG, HOLLIS & MOSELEY

By HOWELL HOLLIS
Howell Hollis
Attorneys for Defendants

[fol. 57]

Filed at 9:00 a.m., Mar. 18, 1959

JUDGMENT

The jury, upon the trial of the above case, having returned a verdict in favor of the plaintiff in the amount of $24,369.40,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the plaintiff, THE UNITED STATES OF AMERICA for the use of SAMUEL J. PICKARD, doing business as PICKARD ENGINEERING COMPANY, do have and recover of the defendants, SOUTHERN CONSTRUCTION CO., INC., and CONTINENTAL CASUALTY COMPANY, the sum of $24,369.40 and all costs which shall be taxed by the Clerk.

This 17 day of March, 1959.

W. A. BOOTLE
United States Judge

ORDER GRANTING DEFENDANTS' MOTION NOTWITHSTANDING VERDICT

The defendants' motion for judgment notwithstanding the verdict has been read and considered.

IT IS CONSIDERED, ORDERED AND ADJUDGED that said motion be, and it is hereby, sustained and that defendants have judgment against the plaintiff on the main case. The Court expressly determines that there is no just reason for delay in the entry of a final judgment for the defendants on the main case and expressly directs the entry of such final judgment.

The Court makes no ruling at this time on the defendants' motion for new trial on the main case nor on the defendants' motion for new trial on the counterclaim.

This 31st day of March, 1960.

/s/ W. A. BOOTLE
Judge, United States District Court, Middle District of Georgia

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[fol. 58]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT NO. 34

Motion for Summary Judgment by Defendants, Southern Construction Company, Inc., and Continental Casualty Company

(Filed August 5, 1958)

The defendant, Southern Construction Company, Inc., and its surety, Continental Casualty Company, move the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the defendants' favor, dismissing the action in so far as the claim of plaintiff is concerned for work performed under the three contracts at Fort Benning, as set forth in paragraphs 3, 4, 5, 7, 8, 9, 10, and 11 of plaintiff's complaint, on the ground that there is no genuine issue as to any material

fact and that the defendants are entitled to judgment as to said claims.

This motion is based upon the sworn depositions of Samuel J. Pickard, the real party plaintiff, taken on April 24, 1957, now on file in said cause, and the affidavit of Mary L. Senn. The depositions of Samuel J. Pickard and said affidavit of Mary L. Senn affirmatively show:

(a) That plaintiff defaulted in his performance on the three contracts at Fort Benning, Georgia, in that after the defendant, Southern Construction Company, Inc., had advanced the total sum of $62,731.26 to Pickard, with which to pay his labor forces, in accordance with the agreement between said parties of October 7, 1955, and the addendum thereto, the plaintiff failed to furnish labor to complete said work in accordance with Articles I and VI of his original contracts with Southern. (See pages 22 through 24 of the depositions of Samuel J. Pickard)

(b) Plaintiff defaulted in his performance of said contracts in that, without notice to Southern Construction Company, Inc., Pickard left said jobs and failed to prosecute the same, in violation of Articles I, VI, and XIII of his original contracts with Southern. (See page 22 of depositions of, Samuel J. Pickard)

[fol. 59] (c) That plaintiff defaulted in his performance of said contracts in that thereafter and without notice to Southern, and in direct violation of Articles VII and XIII of said contracts, plaintiff, removed from said job certain materials, tools, appliances and equipment on the job site used in connection with said work and vital to the prosecution of the same. (See page 23 of the depositions of Samuel J. Pickard)

(d) Southern Construction Company, Inc., complied with the agreement of October 7, 1955. (See affidavit of Mary L. Senn)

(e) Defendants respectfully show that this is a statutory suit on the contracts by the plaintiff for sums alleged to be earned and claimed to be due to plaintiff as a sub-contractor of the defendant, Southern Construction Company,

Inc., entitled to sue under the terms of the Miller Act (USCA Title 40, Section 270 (b)) and the sworn testimony of the real party plaintiff shows that the plaintiff actually defaulted in the performance of said contracts, and that plaintiff as a matter of law is not himself entitled to sue on said contracts (and the payment and performance bonds of the prime contractor) under the terms of the aforesaid Miller Act.

II.

Defendant, Continental Casualty Company, moves the Court to enter a separate judgment in its favor, dismissing it as a party defendant on the ground that the depositions of Samuel J. Pickard and the affidavit of Mary L. Senn affirmatively show that the said Samuel J. Pickard, as sub-contractor, abandoned the prosecution of the work under said sub-contracts and failed to complete the same, which, as a matter of law, constitutes a bar to the plaintiff's enforcement of action for the work performed against this defendant, the surety company on the bond of the prime contractor, Southern Construction Company, Inc.

[fol. 60] III

The defendant, Southern Construction Company, Inc., further moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in its favor on the counterclaim of Southern Construction Company, Inc., against the plaintiff, on the ground that the defendant is entitled to a finding and partial judgment as a matter of law, that the plaintiff by his own sworn testimony, having defaulted in the performance of said contracts at Fort Benning Georgia, the defendant, Southern Construction Company, Inc., as to said Fort Benning jobs was as a matter of law entitled, under its contracts with the plaintiff, to terminate said contracts with the plaintiff and to complete said contracts, under the terms and provisions of Article XIII of each of said sub-contracts between the plaintiff and the defendant, subject to the further obligation of the defendant, Southern Construction Company, Inc., to prove the termination and completion

of said contracts by the defendant? Southern Construction Company, Inc., and the amount, if any, as to which the plaintiff is indebted to the defendant, Southern Construction Company, Inc., on said counterclaim.

HULL, WILLINGHAM, TOWILL & NORMAN
YOUNG, HOLLIS & MOSELEY

By /s/ ROBERT C. NORMAN
Robert C. Norman
Attorneys for Defendants, Southern Construction Company, Inc., and Continental Casualty Company

P. O. Address:
1013 Sou. Finance Bldg.,
Augusta, Ga.

P. O. Address:
Professional Bldg.,
Columbus, Georgia

[fol. 61] TO SAMUEL J. PICKARD, BY AND THROUGH HIS ATTORNEY OF RECORD, EDWARD GALLAGHER, ESQUIRE:

Please take note that the above motion for summary judgment by the defendants, Southern Construction Company, Inc., and Continental Casualty Company, will be heard by the Court on motion of defendants at the time of the pre-trial conference in said case as previously notified, to-wit, on Monday, August 18, 1958, at 9:30 A.M.

/s/ ROBERT C. NORMAN
Robert C. Norman
Of Counsel for Defendants, Southern Construction Company, Inc., and Continental Casualty Company

I, Robert C. Norman, of Counsel for Southern Construction Company, Inc., and Continental Casualty Company, defendants in the above entitled cause, do hereby certify that I have served the real party plaintiff, Samuel J. Pick-

ard, doing business as Pickard Engineering Company, with a copy of the foregoing motion for summary judgment by mailing a copy of same to Edward Gallagher, Esquire, his attorney of record, at his office, Wyatt Building, Washington 5, D. C.

This 5 day of August, 1958.

/s/ ROBERT C. NORMAN
Of Counsel for the Defendants, Southern Construction Company, Inc., and Continental Casualty Company.

[fol. 62]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT NO. 47

Affidavit in Support of Motion for Summary Judgment

(Filed August 5, 1958)

STATE OF GEORGIA,
RICHMOND COUNTY

In person before the undersigned officer, duly authorized by law to administer oaths, appeared Mary L. Senn, who, being first duly sworn, deposes and says that she is Office Manager and Accountant for Southern Construction Company, Inc., a Georgia corporation, with its principal office in Augusta, Richmond County, Georgia, one of the defendants in the above entitled cause, and makes this affidavit in support of the motion for summary judgment filed by the defendants, Southern Construction Company, Inc., and Continental Casualty Company.

Deponent says:

That pursuant to the supplemental agreement dated October 7, 1955, Southern has paid to Pickard the sum of $25,000, as set forth in paragraph 1 thereof, the sum of $13,000 as set forth in paragraph 2 thereof, and has paid to Pickard or his order the total sum of $62,731.26 for

labor, pursuant to the provisions of paragraph 3 as amended of said agreement.

Deponent further says that after Pickard had received the sum of $62,731.26 under the terms of paragraph 3 of said agreement of October 7, 1955, and after Southern Construction Company, Inc., had fully complied with said agreement in all respects, on information and belief deponent says that Pickard came to Augusta, Georgia, and notified Southern Construction Company, Inc., orally and in person that he was unable to continue to perform under said contracts and that his men had actually discontinued work and gone off the jobs. This fact was verified by Southern, and thereupon and thereafter Southern, as prime [fol. 63] contractor, under the provisions of Article XIII of each of said contracts, Pickard having abandoned the work and being in default under each of said contracts, terminated the employment of Pickard and employed another subcontractor to complete the work on each of said contracts.

Deponent further says that Southern has paid either to Pickard or has paid either jointly to Pickard and to subcontractors or materialmen as Southern was paid on requisitions, which included labor and/or material furnished by such sub-contractors and/or materialmen prior to default by Pickard; or has paid to sub-contractors and materialmen in order to complete said contracts after default by Pickard, the total sum of $580,918.09, which sum is in excess of the contract price as amended of $511,939.56, and that Pickard is indebted to Southern for said excess in the amount of $68,978.53, and, therefore, no sums are due and owing to Pickard under the terms of paragraph 5 of the supplemental agreement.

Deponent further says that pursuant to the agreement of October 7, 1955, the sum of $13,000.00, as set forth in paragraph 2 thereof, was paid by Southern to Pickard and to his attorney, Robert H. Winn, for the express purpose of paying all sums then due to subcontractors or materialmen, and that deponent holds a certificate from Robert H. Winn, as attorney for Pickard, dated October 12, 1955, showing that said sum was so applied.

Deponent further says that, in order to avoid confusion and errors in payment of bills, a method and course of dealing was set up subsequent to the October 7th agreement, whereby Robert H. Winn, as attorney for Pickard, was to certify to Southern all accounts for labor and/or materials which were due and payable, and deponent says that on the 15th day of November, 1955, Southern duly received from said Robert H. Winn a list of creditors, and [fol. 64] that on November 30, 1955, deponent caused to be prepared individual checks covering these accounts as certified by said Winn (other than Clarke Bariglon, which by mutual agreement was excluded from the November payment since its work was not accepted by the Government), and forwarded said checks to said Winn for payment, and deponent says that Southern holds in its files a letter dated December 8, 1955, from said Robert H. Winn, acknowledging receipt of said moneys covering said items.

Deponent further says that other than the two payments set forth above, no certification of accounts payable was received from either Robert H. Winn or Samuel J. Pickard, and that no certification was received for the month of December, 1955, and no certification for payment was received for the month of January, 1956, down to the date when said Pickard abandoned said job and defaulted under said contract, to-wit, January 17, 1956.

Deponent further says that one of the large suppliers of materials for Pickard and Southern in connection with the mechanical work on said job was Atlas Supply Company, and that there existed substantial discrepancies between the amount of materials claimed to have been delivered on the job by Atlas and the amounts actually found to have been delivered on said site upon investigation by Southern, and that this controversy as to the correct amount owed to Atlas continued for a considerable period of time but resulted finally in a payment by Southern in the sum of $35,000 in full satisfaction of a total claimed invoice by Atlas in the amount of $104,971.12.

Deponent further says that at no time during the entire course of the work did Atlas fail or refuse to furnish materials as required to either Pickard or to Southern, but

continued to cooperate fully throughout the course of the work.

[fol. 65] Deponent makes this affidavit in connection with the hearing on the motion for summary judgment by the defendants in the above cause.

MARY L. SENN

Sworn to and subscribed before me,
this 5th day of August, 1958:

GERTRUDE L. VENDENY
Notary Public,
Richmond County Georgia

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT NO. 16

Supplemental Affidavit in Support of Motion

STATE OF GEORGIA,
RICHMOND COUNTY

Personally appeared before the undersigned officer, duly authorized by law to administer oaths, Richard J. Baxter, who, being first duly sworn, deposes and says that he is Secretary-Treasurer of Southern Construction Company, a Georgia corporation, with its principal office in Augusta, Richmond County, Georgia, one of the defendants in the above entitled cause, and makes this supplemental affidavit in support of the motion for summary judgment filed by the defendants.

Deponent further says that Southern paid to Pickard prior to January 17, 1956, the sum of $62,731.26, under the terms of paragraph 3 of the agreement of October 7, 1955.

Deponent further says that Southern fully complied with the provisions of paragraph 5 of said agreement of October 7, 1955, and that Southern paid as it was paid by the Army all payments either jointly to Pickard and to subcontractors for materials, or to Pickard as Southern was paid [fol. 66] on requisitions which included labor and/or material furnished by such subcontractors and/or materialmen.

Deponent further says that in order to avoid confusion and errors in payment of bills, a method and course of dealing was set up subsequent to the October 7th agreement, whereby Robert H. Winn, as attorney for Pickard, was to certify to Southern all accounts for labor and or materials which were due and payable, and deponent says that on November 15, 1955, Southern duly received from Robert H. Winn a list of creditors, and that on November 30, 1955, Southern caused to be prepared individual checks covering these accounts as certified by said Winn (other than Clark Baridon as hereinafter discussed), and forwarded said checks to said Winn for payment, and deponent shows that Southern received a letter, dated December 8, 1955, from said Robert H. Winn acknowledging receipt of said moneys covering said items, a copy of said letter being hereto attached as Exhibit "A".

Deponent further says that with reference to the last paragraph of said letter of Robert H. Winn, no additional certification of accounts was received from said Robert H. Winn subsequent to said letter of December 8, 1955, and deponent further says that other than the payment of $13,000.00 made under the agreement of October 7, 1955, and the payments made pursuant to the certification of Robert Winn, dated November 14, 1955, no certification of accounts payable was received from either Robert H. Winn or Samuel J. Pickard from October 7, 1955, through January 17, 1956, the date on which Pickard abandoned the work.

Deponent further says that Clark Baridon, which was included in the certification of November 14, 1955, was excluded from the November payment by mutual agreement of Pickard and Southern, through its attorneys, since its work at that time was not accepted by the Government, as shown by letter from Robert C. Norman to [fol. 67] Robert H. Winn, dated November 21, 1955 (paragraph one thereof), and by letter of Robert H. Winn, attorney for Pickard, addressed to Robert C. Norman in reply thereto, dated November 29, 1955, the same being hereto attached as Exhibits "B" and "C".

Deponent further says that Atlas Supply Company was not included in the certification of November 14, 1955, as

certified by Robert H. Winn, attorney for Pickard, and that at all times from October 7, 1955, through January 17, 1956, there existed substantial discrepancies between the amount of materials claimed to have been delivered on the job by Atlas and the amounts actually found to have been delivered on said site upon investigation by Southern; that the controversy as to the correct amount due to Atlas included billing by Atlas to Southern for tools furnished to Pickard which were not properly chargeable against the jobs, as well as the failure of Atlas to give credit to Southern for payments previously made to Atlas by Southern; that as a result of this controversy as to the correct amount owed to Atlas, a conference was held between Pickard, Atlas, and Southern in December, 1956, at which time Southern paid jointly to Pickard and to Atlas with their full acquiescence and approval, the sum of $100,000, and that as a result of this payment by Southern to Atlas on December 16, 1955, with the full approval of Pickard and Atlas, no further sums were due at that time to said Atlas, but deponent says that Atlas continued to claim for additional materials furnished the sum of $139,492.06 for materials furnished at both Fort Campbell, Kentucky, and Fort Benning, Georgia, over and above the payment of $100,000 made on December 16, 1955.

Southern contested the correctness of this amount as the balance due and owing for materials furnished, and subsequent to default by Pickard, on January 17, 1956, paid Atlas the sum of $35,000 in full satisfaction of a total claim invoiced by Atlas in the amount of $139,492.06. [fol. 68] Deponent further says that it was not until the December 16 meeting that Atlas finally gave full credit to Southern for all previous payments made to Atlas and Pickard jointly by Southern.

Deponent further says that at no time during the entire course of the work did Atlas fail or refuse to furnish materials as required to either Pickard or to Southern but continued to cooperate fully throughout the course of the work.

Deponent further says that at no time during the entire course of the work, and more particularly from October

7, 1955, through January 17, 1956, did any supplier or materialman of Pickard fail or refuse to furnish materials or services as required to either Pickard or to Southern, but continued to cooperate fully in performing the work at Fort Benning to the best of their ability, and deponent further shows that at no time did any supplier, materialman or subcontractor of Pickard hinder or impair the progress of the work being performed by Pickard as a result of any failure whatsoever to receive payment for materials, supplies or services furnished on the job.

Deponent further says that the total amount of the subcontract between Southern and Pickard, together with extras and change orders applicable thereto, was $511,931.56; that as of January 17, 1956, the date of default by Pickard, Southern had paid to Pickard individually, or jointly with others, or to others pursuant to the authorization and request of Pickard, the total amount of $431,925.90.

Sworn to and subscribed before me, this 22 day of August, 1958:

GERTRUDE L. VERDERY,
Notary Public,
Richmond County, Georgia

RICHARD J. BAXTER
Sec.-Treas.

[fol. 69]

IN UNITED STATES DISTRICT COURT

From Plaintiff's Exhibit No. 21, the Transcript of Testimony in Pickard v. Southern Construction Company, and Civil Action No. 652, United States District Court for the Middle District of Georgia

* * * * * * *

Q. (Mr. Grant) But the Atlas account was the one that you say was hollering and that you all had the agreement about or the meeting about on December 16, and you paid $100,000 on it then?

A. (Mr. Baxter) That was in response to a letter from Mr. Winn, requesting a meeting, yes.

Q. And the credits that you were contending that should be made against that bill of some $51,000 were composed of the money that Atlas had paid to Mr. Pickard out of the first check, when you paid that first requisition, one of the things you were contending about, wasn't it?

A. That's one of the checks, yes.

Q. Yes sir, in other words, there's been testimony here from Mr. Pickard that in their first requisition which was submitted, that the materials on hand at the time that requisition was made, that Atlas was owed some amount, I've forgotten, but which would leave coming to him out of that first estimate the difference between their bill as of that time when the requisition was submitted, and the amount of the payment; and that they paid that to him in two checks, one $12,000 and the other one $15,000 roughly; and that was his contention at the time, wasn't it?

A. Whose contention?

Q. Mr. Pickard's?

A. Mr. Pickard?

Q. Yes sir.

A. By the time we mailed the check to Mr. Pickard for his first requisition, we had been notified of another 100-odd thousand dollars worth of materials supplied by Atlas, for which we were responsible?

Q. Oh yes sir, certainly.

A. And Mr. Pickard was aware that that was proper and didn't disagree with the method.

[fol. 70] Q. Well, the material was just pouring down there in large amounts?

A. Yes sir.

Q. Amounting to a lot of money?

A. Yes sir; yes sir, it was.

Q. But his contention and Atlas' was that, out of this first payment of the first requisition which was $45,000 and some odd dollars, that out of that at the time it was submitted, that what Atlas had coming was a certain amount and that the balance was Pickard's, due to labor he'd paid for and due to materials he'd brought down from his warehouse in Washington, which were incorporated into the job, wasn't it?

A. Yes, sir, but he didn't receive payment—the best I can determine, he didn't receive payment for the material, the salvage material that he had accumulated from other jobs that he shipped down here that didn't fit into this job. He had no invoices or it's my understanding that he had no invoices to substantiate those materials and, as a result, did not receive credit from the Government for any payment on those materials; but when we sent him his check, he was in agreement and didn't in any manner indicate that it was not the proper way to make the payment. The transaction between Mr. Pickard and Atlas was one that I was not aware of.

Q. Yes sir, in other words, the basic dispute between you and Atlas was that you wanted the whole $45,000 that you paid on the first estimate to be credited on that Atlas account, because you made the check payable jointly to Pickard and Atlas and you didn't think Pickard ought to have got a dime out of it; wasn't that your position?

A. Any disposal—that was made out and that was a transaction between Atlas and Pickard, because of my responsibility for payment of the materials and due to the fact that I had been promised a bond which would protect me—

Q. Well, I just asked you if that wasn't your contention about what was supposed to be done with the money?

A. I'm trying to explain what my contention was.

[fol. 71] Q. Well, if you'll tell me whether you agree with me that that is your contention or not and then make whatever explanation you desire. The question was, wasn't it your contention that, out of that payment of the first requisition of $45,000, and some odd dollars, in which you made the check payable jointly to Atlas and Pickard, that Atlas should—that the whole amount should be applied on the Atlas account and that Pickard shouldn't get a dime out of it; wasn't that your contention?

A. That is not a "yes" or "no" answer. I would say that it was my contention that it was mailed to Atlas by Southern Construction Company and with Mr. Pickard's knowledge. Now, does that answer your question or not?

Q. Just answer my question, please sir, as to whether

you contended that the whole amount should have been applied on the Atlas account, to reduce their statement?

A. That was the intention of it, yes sir; yes sir.

Q. And it was your contention that Mr. Pickard wasn't entitled to a dime of that money, to the benefit of a dime of that money, whether or not what it was paid for represented his labor that went into it, his materials that came from somewhere else, some labor of some of his other subcontractors that he owed money for, or not; that's true, isn't it?

A. Mr. Grant, any one who deals with the Government realizes he's going to have to make some financial arrangements and that he's going to be compelled to, either through a bank loan or through financing of some sort, invest some money in the job. He can't expect the Government to finance him all through the job.

Q. Well, you can't expect that all of a certain payment shall go to one particular place either?

A. Mine have on numerous occasions; yes sir, mine have; mine have on numerous occasions.

Q. Now, one other thing that was contended for between you and Atlas and which you've already testified, was that there may have been some tools and so forth on their [fol. 72] bill that were furnished to Mr. Pickard and that you ought to be given credit for that?

A. Yes sir, that's correct.

Q. You do know that Mr. Pickard was regularly engaged in the mechanical contracting business and that he had his own major tools, machines and so forth, to work with, had to have them to be in that business, didn't he?

A. We hoped he did, yes sir. He didn't have enough equipment down there to man the job, no sir.

Q. Of course, as to hand tools, I believe you said a while ago they're expendable?

A. Yes sir, I think you're very fortunate to get them back.

Q. That's your position with reference to Mr. Proctor?

A. That's my position with reference to anybody but I don't see why I should buy Mr. Pickard's tools, Mr. Grant, when it's his contractual obligation to furnish his equipment.

Q. No, it's your contention though that that ought to be put as a credit on the bill, on the statements that were being sent?

A. Yes, that's logical.

Q. But what they would send a statement for was, suppose they were to take it over to him and didn't have put on that statement what he owed them, they didn't have to give credit for what your said you ought to be entitled to in your settlement?

A. But I was not—because I was responsible for anything I acknowledged on the Atlas bill of Pickard, if Pickard didn't pay it; but I would not be responsible for tools or equipment sold directly to Atlas as part of his equipment. So, it didn't appear and it shouldn't appear as the responsibility of Southern Construction Company.

Q. Yes sir, that tools and equipment business was a minor part of the total figure that you were contending should be deducted then, wasn't it?

A. You say a "minor"?

Q. Yes sir.

A. I'm trying to remember figure of $67,000, minor to you, important to me.

[fol. 73] Q. Well, you said $51,000 a while ago?

A. I'm thinking of tools and equipment in addition probably to the 51—; and I'm trying to remember back four years, Mr. Grant.

Q. Well, the $28,000 plus some amount out of this first check which you're talking about, we've established that. Incidentally, while we're at that, that is the only requisition received from Mr. Pickard that was ever paid substantially in full, isn't it, the first one?

A. I believe the checks speak for themselves.

Q. All right sir. Now, one of your other contentions with reference to that account was some payment of $13,000 to Atlas on the Fort Campbell job ought to be credited on that account, wasn't it?

A. Should have been credited? Will you repeat your question, please sir?

Q. Isn't a part of the $51,000 you were talking about $13,000 that was paid to Atlas on the Fort Campbell job, but which you were saying they ought to deduct off of

these statements and composed a part of the $51,000 difference?

A. I don't believe that's correct, sir. I think that the amount in dispute between Atlas, the $51,800, or roughly $52,000, at that time that we were being billed for, that we shouldn't have been billed for.

Q. At least those contentions of yours, which we've covered, were advanced in the meeting of December 16, when you were talking about making a payment on the Atlas account, weren't they?

A. We paid Atlas $100,000 and every one was satisfied at the time, as far as I know, sir.

Q. The meeting primarily though was arranged because of the insistance of Atlas and of Mr. Pickard that Atlas be paid some money, wasn't it?

A. No, we were advised of it and we were very eager to have the meeting ourselves. We would have been happy to have had it much sooner. We don't like having a bill in the amount of $52,000 overcharge, with no explanation or clarification.

[fol. 74] Q. And they weren't very happy about not getting any money?

A. No sir, they were delivering materials and were very friendly with everybody. I would be too with 51— or $52,000.

Q. Well, a part of their complaint about not getting any money was responsible for having the meeting, to talk about the whole situation?

A. Yes sir, I think that's correct.

Q. And after talking about it and you advancing your contentions and Mr. Pickard and Atlas advancing theirs, it resulted in your making the payment of $100,000 on account?

A. Yes sir, that's correct.

Q. And that's the last time you ever paid until after Mr. Pickard left, isn't it?

A. Yes, I believe that's correct, yes sir. He left soon after that.

In United States District Court

Motion for Amendment of Findings of Fact and Conclusions of Law Under Rule 52(b), Federal Rules of Civil Procedure—Filed March 23, 1960

Plaintiff respectfully moves for amendment of findings of fact and conclusions of law in the following particulars:

* * * * * * * * * * *

9. In lieu of the findings contained on Pages 9, 10 and 11, it is respectfully and earnestly requested that the following be substituted:

"There were three separate contracts between plaintiff and defendant Southern Construction Company at Fort Benning totaling approximately $510,000.00. There was one contract at Fort Campbell, at a contract price of $50,000.

"At the time the payment in question of $35,000 was made to the Atlas Supply Company which was eight months after plaintiff's work was terminated under all the contracts at Benning and Campbell, deliveries to Benning had totalled $104,971.12, and to Campbell $34,520.94. In other [fol. 75] words, the total account was $139,492.06. It has been stipulated in this case that the creditor, Atlas Supply Company carried this account of the plaintiff on its books as one single, indivisible account at the time the $35,000 settlement payment involved here was made.

"The evidence shows that the sum of $35,000 was paid in settlement of this total amount. It is so stated on the face of the $35,000 check, and in the release that was delivered in return for the check, both of which comprise plaintiff's Exhibit No. 22. Defendants' principal witness Mr. Baxter stated in his testimony that there never has been any attempt to apply, or allocate, or appropriate the entire amount to Fort Campbell. Concerning this he said that there was no 'bookkeeping decision or an auditing decision or a company decision'

to do so. (92) Counsel for defendants admit that there was no attempt to allocate the entire payment to Campbell. (141)

"Prior to the present proceeding there was a suit tried between the same parties involving the Benning contract before a Jury of the United States District Court for the Middle District of Georgia, which resulted in a verdict and judgment for the plaintiff under date of March 18, 1959. There was also a counterclaim in the Georgia case in the approximate amount of $73,000, which was necessarily denied *in toto* by the judgment for the plaintiff. In the counterclaim that was originally filed in the Georgia suit, on January 30, 1957, the $35,000 was included. This is shown by the figures contained in Paragraph 3 of the counterclaim. (Pl. Ex. No. 15). Thereafter on August 5, 1958, defendants filed a motion for summary judgment as to 'the three contracts at Fort Benning.' (Pl. Ex. No. 34) In Paragraph III of this motion, summary judgment is requested on the counterclaim as originally filed. There is no amendment or deletion to the counterclaim, even though the motion itself is confined to the [fol. 76] 'three contracts at Fort Benning.' In support of this motion certain affidavits were filed by Mr. Baxter and Mrs. Senn. In the Baxter affidavit (Pl. Ex. No. 18) dated August 17, 1958, it is stated that the $35,000 was paid 'in full satisfaction of a total claimed invoice by Atlas in the amount of $104,917.12', which was the exact amount of the Benning deliveries, exclusive of the Campbell deliveries. The affidavit of Mrs. Senn (Pl. Ex. No. 17) dated August 5, 1958, was to the same effect. And in supplemental affidavits dated August 22, 1956, both parties repeated these identical statements. (Pl. Ex. No. 16) It is clear that at this juncture in the proceedings the defendants were seeking to apply the $35,000 payment to the Benning contract, and were seeking judgment accordingly. It is true that a short time

later an additional voluminous and separate motion for judgment on the counterclaim in the Georgia case was filed, wherein a reduction in the total contract figures would seem to indicate that for the purposes of this latter motion only the Fort Benning contracts were included, but there was no corresponding reduction in the amount of the counterclaim itself. It is also true that in an exhibit subsequently introduced by defendants at the Georgia trial (Def. Ex. No. 8) the item in question does not appear. In summary, it can thus be said that so far as the pleadings in the Georgia case are concerned, the item of $35,000 was included to the end; also, it was affirmatively pursued at least until the time of the first motion for summary judgment.

"Defendants say they did not ultimately 'claim' the item of $35,000 in Georgia case, solely because their attorney advised them not to do so, and their attorney testified to this effect in this proceeding. (136-145) He testified that somewhere along the line he decided and advised his clients that they should claim the entire amount of $35,000 in the Campbell proceeding, but he cannot say just when, [fol. 77] except that it was 'sometime between April of 1957 and August of 1958.' (142)

"The record shows that this suit was filed in Nashville on April 4, 1957. On April 15, 1957, in connection with the Georgia case, Mr. Norman, defendants' attorney, wrote plaintiff's attorney (Pl. Ex. No. 32) stating that,

> 'Included in the *Fort Benning* invoices is our voucher No. 9715 dated August 27, 1956, payable to Atlas Supply Company in the amount of $35,000 in full satisfaction for all materials delivered to both Fort Benning and Fort Campbell jobs. This was an overall lump-sum settlement, and we are unable to allocate this amount as between Fort Campbell and Fort Benning.' (Italics supplied)

"It was not until the pre-trial hearing before this Court on June 17th of this year that there emerged any clear-cut intention to segregate the Nashville case for the purpose of asserting the $35,000 item. As a result of the pre-trial hearing, the defendant then, just two months before the trial, amended its original counterclaim by reducing it to an amount based largely on the item of $35,000.

"From what has been said it is clear that (1) defendants admit there never was any attempt to 'allocate' the payment to the Campbell contract, (2) there is evidence to indicate the item was actively pursued in the Georgia case and was before the Jury when it reached its verdict, and (3) until three months after the judgment was rendered in Georgia the record in this proceeding reflects no decision or intention to apply the $35,000 item against the Campbell contract alone, rather than the Benning contract.

"Under date of December 30, 1959, the Court in Georgia issued an informal opinion (a certified copy of which has been filed in this Court by de- [fol. 78] fendants) to the effect that he intends to set aside the verdict of the Jury in the Georgia proceeding and grant judgment for the defendants. He also indicates he may decide to grant the defendants a new trial on their counterclaim in that case. If and when this opinion is implemented by an order, the defendants will have a full opportunity to pursue the $35,000 counterclaim item in that proceeding, where it was originally filed."

10. Should the immediately preceding findings not be fully adopted, we suggest the words "in its entirety" be omitted from the second paragraph on Page 9, and the top of Page 10, as the proof shows conclusively that Southern at all times admitted owing to Atlas under the Benning contract a sum in excess of $50,000, over and above disputed items.

[fol. 81] [File endorsement omitted]

No. 14,239.

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

UNITED STATES for Use of SAMUEL J. PICKARD d/b/a PICKARD ENGINEERING COMPANY,
Appellant,

v.

SOUTHERN CONSTRUCTION CO., INC., and CONTINENTAL CASUALTY COMPANY,
Appellees.

Appendix to Brief on Behalf of Appellees—Filed August 15, 1960

[fol. 82]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT NO. 2

Sub Contract
With

Pickard Engineering Company — Amount $50,000.00

This agreement entered into this 5 day of May, 1955, by and between Southern Construction Company, Inc., of Augusta, Ga., hereinafter called Contractor and Pickard Engineering Company, 6230 Third Street, NW of Washington, D. C., hereinafter called Sub-Contractor.

Witnesseth, that, Whereas Contractor has heretofore entered into a General Contract with U. S. Government, Department of the Army, Purchase and Contracting Office of Fort Campbell, Kentucky, hereinafter called the Owner,

to furnish all labor and materials and perform all work required for Improvement of 10-74 Man Type Barracks at Fort Campbell, Serial No. 15-056-55-100 in strict accordance with the specifications, schedules and drawings prepared by U. S. Government, Office of the Post Engineer, Fort Campbell, Kentucky, of ....., Architect, which are made a part of said General Contract, and which are now made a part of this Sub-contract insofar as they apply, and the parties hereto desire to contract with reference to a part of said work,

Now, Therefore, in consideration of the mutual agreements herein contained, it is agreed as follows:

Article I—Sub-contractor shall furnish all labor and materials and perform all work necessary to complete the following part or parts of the work of the General Contract in all respects as is therein required of the Contractor, and all work incidental thereto, namely:

Furnish all labor, materials, tools and equipment to completely do all plumbing, heating in strict accordance with [fol. 83] all plans, specifications, all addenda and the contract documents.

No extra work is to be performed under this contract without written authorization of Southern Construction Company, Inc.

This sub-contractor to supply necessary shop drawings, cuts and samples, all as required by the Government.

The contractor reserves the right to increase or decrease the amount of this contract at a unit price of $5,000,00 per building.

The contractor will patch the concrete floors only where necessary trenches are required to install any new piping.

Article II—(a) Contractor shall have the same rights and privileges as against the Sub-contractor herein as the Owner in the General Contract has against Contractor.

(b) Sub-contractor acknowledges that he has read the General Contract and all plans and specifications and is familiar therewith and agrees to comply with and perform all provisions thereof applicable to Sub-contractor.

(c) All work shall be done under the direction of the Architect and his decisions as to the true construction and meaning of the drawings and specifications shall be final. Sub-contractor shall conform to and abide by any additional specifications, drawings or explanations furnished by the Architect to illustrate the work to be done.

(d) Sub-contractor shall procure at his own expense all required permits and licenses.

Article III—(a) Sub-contractor shall begin work as soon as instructed by Contractor, and shall carry on said work promptly, efficiently, and at a speed that will not cause delay in the progress of Contractor's work or other branches [fol. 84] of the work carried on by other Sub-contractors. Contractor may require Sub-contractor to prosecute in preference to other parts of the work such part or parts as Contractor may specify.

(b) Any damages for delay caused by Sub-contractor shall be deducted by Contractor from the agreed price for said work as liquidated damages and not as penalty, subject, however, to the option of Contractor to terminate said employment for default as herein elsewhere provided.

(c) Contractor shall not be liable to the Sub-contractor for delay to Sub-contractor's work by the act, neglect or default of the Owner, or the Architect, or by reason of fire or other casualty, or an account of riots, or of strikes, or other combined action of the workmen or others, or on account of any acts of God, or any other cause beyond Contractor's control, or on account of any circumstances caused or contributed to by the Sub-contractor; but Contractor will cooperate with Sub-contractor to enforce any just claim against the Owner or Architect for delay.

(d) Should Sub-contractor be delayed in his work by Contractor then Contractor shall owe Sub-contractor therefor only an extension of time for completion equal to the delay caused and then only if a written claim for delay is made to Contractor within forty-eight hours from the time of the beginning of the delay.

(c) Sub-contractor shall remove from the premises, as often as directed by the Contractor, all rubbish and surplus material which may accumulate from the prosecution of said work and should Sub-contractor fail to do so Contractor may, at his option, remove same at Sub-contractor's expense.

Article IV—Sub-contractor shall make all alterations, furnish the material for and perform all extra work or [fol. 85] omit any work Owner or Architect may require, without nullifying this agreement, at a reasonable addition to, or reduction from, the sub-contract price, hereinafter named, and pro rata to the same. No changes are to be made, however, except upon written order from Contractor, and Contractor shall not be held liable to Sub-contractor for any extra labor, materials, or equipment furnished without such written order. The amount to be paid by Contractor, or allowed by Sub-contractor, by virtue of same, shall be stated in such order, if the amount can be agreed upon, but if not then it shall be fixed by arbitration as provided in Article XI, but meanwhile the work shall proceed as directed.

Article V—Sub-contractor shall provide safe and sufficient facilities at all times for inspection of the work by Contractor, the Architect, or their authorized representatives and shall within twenty-four (24) hours after receiving written notice from Contractor proceed promptly to take down all portions of the work and remove from the grounds and buildings all material whether worked or unworked which the Architect shall condemn or fail to approve, and shall promptly make good all such work, and all other work damaged or destroyed in removing or making good said condemned work.

Article VI—Sub-contractor shall at all times supply adequate tools, appliances and equipment, a sufficient number of properly skilled workmen and a sufficient amount of materials and supplies of proper quality to efficiently and promptly prosecute said work and shall promptly pay for all material purchased and shall pay all workmen each week if required and obtain and furnish Contractor weekly

with signed receipts from all workmen showing the date of payment, amount paid, number of hours paid for, the days on which said work was performed, the classification [fol. 86] of the labor so paid and the rate of wage per hour paid, and shall also supply Contractor weekly with two copies of payroll verified by affidavit.

Article VII—To secure performance by Sub-contractor, and any funds expended by Contractor hereunder, Contractor shall have a lien upon all materials, tools, appliances and equipment of the Sub-contractor on the premises or used in connection with said work.

Article VIII—(a) Sub-contractor shall turn said work over to Contractor in good condition and free and clear of all claims, encumbrances or liens and shall protect and save harmless Contractor and Owner from all claims, encumbrances and liens growing out of the performance of this Sub-contract, and Sub-contractor will at his own cost and expense (including attorney's fees), defend all suits to establish such claims, and pay any such claim or lien so established.

(b) Sub-contractor shall, as often as requested by the Owner or by Contractor, furnish a sworn statement showing all parties who furnish labor or materials to Sub-contractor, with their names and addresses and the amount due or to become due each. Like statement may be required from any Sub-contractors of the Sub-contractor.

Article IX—(a) Sub-contractor shall indemnify Contractor against all claims for damages arising from accidents to persons or property occasioned by the Sub-contractor, his agents or employees; and Sub-contractor shall defend all suits brought against the Contractor on account of any such accidents and shall reimburse Contractor for any expense including reasonable attorney's fees sustained by Contractor by reason of such accidents.

(b) Sub-contractor shall carry public liability insurance and also such employers liability or workmen's compensa- [fol. 87] tion insurance as may be necessary to insure the liability of the parties hereto for any injuries to Sub-

contractor's employees, and all insurance required by the law of the place where the said work is to be done, and shall furnish Contractor with satisfactory evidence that such insurance has been obtained and paid for and will continue in force until the completion of said work, and if the Sub-contractor should sublet any of this work to a third party, Sub-contractor shall see that said third party shall do likewise.

(c) The Sub-contractor shall carry fire and extended coverage insurance on his part of the work, unless special written agreement is made to the contrary.

(d) The Sub-contractor, as a part of the obligations assumed by him in this sub-contract, accepts exclusive liability for all taxes and contributions required of the Contractor or Sub-contractor by the Federal Social Security Act and the Unemployment Compensation Law or similar law in any State in respect to the employees of Sub-contractor in the performance of the work herein provided for, and agrees to furnish Contractor with suitable written evidence that he has been authorized to accept such liability. The Sub-contractor further agrees that if he cannot furnish said evidence, or should fail to do so prior to beginning his work, the Contractor may, at his option, pay or reserve for payment said taxes and contributions and deduct the amount paid or reserved from payments due, or to become due the Sub-contractor. The Sub-contractor agrees to protect the Contractor against all liability in respect to said employees under said Act or Law.

(e) The Sub-contractor accepts exclusive liability for any and all sales tax or use tax which may be assessed against materials, equipment or labor used in his part of the work.

[fol. 88] Article X—Contractor agrees to pay Sub-contractor for said work the sum of Fifty Thousand and tractor) subject to additions and deductions as hereinbefore provided, payable as the work progresses, based upon estimates of the Architect and payment by Owner to Contrac-No/100 Dollars (any exchange shall be borne by Sub-con-

tor. Contractor may at his option retain 10% of each estimate until final settlement and may withhold payment of any estimate until Sub-contractor has furnished Contractor with suitable evidence that he has paid in full for all labor, materials and supplies used in the work through the date of the estimate. Final payment shall be made within 30 days after the completion of the work included in this sub-contract, written acceptance by the Architect, and full payment therefor by the Owner.

Article XI—If any question of fact shall arise under this contract, either party hereto may demand an arbitration by reference to a Board of Arbitration, to consist of one person selected by Contractor, and one person selected by Sub-contractor, these two to select a third, and in case these two fail to select a third within three days, he shall be named by the Architect or his authorized representative. In case either party fails to name an arbitrator within three days after requested to do so, the Architect, or his authorized representatives, shall name an arbitrator to represent the party so failing to name one. The written decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expenses of such reference.

Article XII—Sub-contractor shall give bond payable to the Contractor, in the sum of $50,000.00 on the form hereto attached, with surety thereon satisfactory to the Contractor, for the faithful performance of this Sub-contract. [fol. 89] Sub-contractor to furnish and pay for Performance and Payment bond.

Article XIII—(a) Should Sub-contractor at any time breach this agreement or fail to prosecute the said work with promptness, diligence and efficiency, or fail to perform any of the requirements hereof, Contractor may without notice (or, if notice be required by law, then after twenty-four hours written notice either by registered mail addressed to Sub-contractor at 6230 Third Street, NW, Washington 11, D. C. or by posting in some conspicuous place on the job) proceed as follows:

1. Provide such materials, supplies, equipment and labor as may be necessary to complete said work, pay

for same and deduct the amount so paid from any money then or thereafter due Sub-contractor, or

2. Terminate the employment of Sub-contractor, enter upon the premises and take possession, for use in completing the work, of all the materials, supplies, tools, equipment and appliances of the Sub-contractor thereon and complete the work, or have same completed by others, and be liable to Sub-contractor for no further payment under the agreement until final payment is due and then only if and to the extent that the unpaid balance of the amount to be paid under this Sub-contract exceeds the expense of the Contractor in finishing the work.

(b) If the amount expended by Contractor under 1, above or the cost of completing the work under 2, above, exceeds the unpaid balance of sub-contract price herein stated, Sub-contractor shall pay Contractor such excess.

(c) Should Sub-contractor at any time fail to pay for all labor, materials or supplies used by Sub-contractor in said work when due, Contractor may, at his option, pay [fol. 90] for same and charge to Sub-contractor; or may, at his discretion, and with the consent of Sub-contractor, pay at any time claims for labor, materials and supplies used in the work.

(d) Should Sub-contractor default in any of the provisions of this Sub-contract and should Contractor employ an attorney to enforce any provision hereof or to collect damages for breach of the Sub-contract or to recover on the bond mentioned in Article XII above, Sub-contractor and his surety agree to pay Contractor such reasonable attorney's fees as he may expend therein. As against the obligations herein contained Sub-contractor and his surety waive all rights of exception.

Article XIV—(a) Sub-contractor shall not sublet, assign or transfer this Sub-contract, or any part thereof, without the written consent of the Contractor.

(b) This Sub-contract contains the entire agreement between the parties, and all additions thereto or changes

therein shall be in writing and shall not be binding unless same are in writing.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written:

PICKARD ENGINEERING CO., (Seal)
(Sub-contractor)

By .....

SOUTHERN CONSTRUCTION CO., INC.,

By .....
Secretary-Treasurer.

Witnesses:
(2 for each party)

WM. L. SPRUELL.

[fol. 91]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT NO. 1

Agreement.

This agreement, made and entered into in duplicate, this 7th day of October, 1955; between Southern Construction Company, Inc., hereinafter called Southern, as prime contractor, and S. J. Pickard, doing business as Pickard Engineering Company, hereinafter called Pickard, as sub-contractor,

Witnesseth:

Pickard holds sub-contracts with Southern for improvement of mobilization type barracks, bachelor officers' quarters, and mess halls at Fort Benning, Georgia, under Contracts DA-09-038-A111-669, DA-09-038-A111-672, DA-09-038-A111-673, as well as a sub-contract for work at Fort Campbell, Kentucky, under Contract No. DA-15-056-A111-112. The sub-contractor has been unable to obtain payment

or performance bonds on said jobs as called for under the terms of each of said contracts. The contractor has been withholding certain funds due to sub-contractor in lieu of said bonds, and sub-contractor is in need of funds with which to complete said jobs and to pay other bills now owed by the sub-contractor.

Now, Therefore, in consideration of the mutual covenants and agreements hereinafter set forth and the mutual benefits flowing to the parties hereto, the receipt and adequacy of which considerations is hereby acknowledged, said parties do hereby agree as follows:

1. Southern pays and delivers contemporaneously herewith to Pickard the sum of $12,500.00, with the full right [fol. 92] to Pickard to use said funds in any manner he may see fit without restriction. In addition, the parties will cause to be conducted an inventory of the materials now on hand to complete the contracts at Fort Benning, Georgia, said inventory to be conducted by a representative from each of the parties, which inventory shall be begun immediately and completed on or before Friday, October 7, 1955. In the event said inventory shows a substantial portion of the materials on site necessary to finish said jobs as represented by Pickard, Southern agrees to pay not later than Saturday, October 8, 1955, an additional sum of $12,500.00 without restriction as to the use of said funds.

2. Southern pays herewith, jointly to Pickard and to his attorney, Robert H. Winn, an additional sum of $13,000, to be used solely for the purpose of paying sums now due to sub-contractors or materialmen of Pickard who furnished labor or materials to the Fort Benning jobs. Pickard and Winn agree to apply said funds to such accounts and Winn will account to Southern within ten days from date certifying in writing as to the various parties receiving said funds.

3. Southern further agrees to deliver a check at Columbus, Georgia, to Pickard on Friday of each week, beginning Friday, October 7, 1955, covering the actual net payroll for labor performing work on the Fort Benning jobs as submitted on payroll forms by Pickard, on Thursday

of each week, beginning Thursday, October 6, 1955. Pickard agrees to obtain the signature of each laborer showing a receipt for the sums so paid each week, with said receipts to be furnished to Southern not later than Monday following payment on Friday of each week. In addition, Southern agrees to mail, on Friday of each week, beginning October 7, 1955, to Pickard and Robert H. Winn, [fol. 93] a check covering the difference between the net payroll figure paid direct to Pickard at Columbus and the gross payroll figure, which sum is to be deposited in a joint account by Pickard and Winn, and is to be used solely for the purpose of paying the withholding and social security taxes due to the United States. Pickard and Winn agree to furnish a photostatic or certified copy of their returns to the Government covering said taxes as and when said returns are required by law.

4. Within ten days from date of this agreement, Pickard agrees:

(a) To furnish to Southern the sworn affidavit of Atlas Supply Company, setting forth the amount in dollars of materials actually delivered or invoiced to the Fort Benning jobs by Atlas, and the amount of materials to be furnished by Atlas necessary to complete both the Fort Benning jobs and the Fort Campbell job, with an itemized list attached of the materials to be furnished by Atlas on each of the four separate jobs.

(b) To furnish sworn affidavits of Pickard as to all other materials necessary to complete both the Fort Benning and Fort Campbell jobs, together with an itemized list of all materials shown separately for each job and attached to said affidavit as exhibits.

(c) To furnish a sworn affidavit of Pickard as to the balance owed to all sub-contractors of Pickard necessary to complete both the Fort Benning and Fort Campbell jobs, showing said jobs separately by job numbers.

(d) To furnish a sworn affidavit of Pickard that all withholding taxes, social security payments, and workmen's compensation payments have been made in full by

[fol. 94] Pickard down to the date of this agreement, or substantial provision made therefor.

5. Southern hereby waives Article 12 of each of its sub-contracts, requiring payment or performance bonds, and Pickard hereby waives all claims against Southern as a result of the withholding of any funds due Pickard on requisition in lieu of bond and further agrees and authorizes Southern to withhold all other and further payments on work now completed or to be completed during the course of said jobs, until the completion of each said job by Pickard and the final acceptance and payment thereof by the Army to Southern, excepting only the payments herein agreed to be made plus additional payments which will be made by Southern either jointly to Pickard and to sub-contractors or materialmen, or to Pickard, as Southern is paid on requisitions which include labor and or material furnished by such sub-contractors and/or materialmen. All sums paid heretofore, herewith or hereafter by Southern to Pickard or for the account of Pickard shall be applied against the total contract price due to Pickard on said jobs.

6. Except as herein specifically waived, all of the other terms and conditions of the original contracts between the parties shall remain in full force and effect, and this agreement shall be construed as supplemental thereto.

7. This agreement will be terminated and the terms and conditions of the original contracts between the parties be in full force and effect upon Pickard providing Southern with payment and performance bonds on said jobs as called for under the terms of each of said contracts.

In Witness Whereof, Southern has caused these presents to be executed by its duly authorized officer, and Pickard [fol. 95] has hereunto set his hand and seal, all in duplicate, the day and year first above written.

SOUTHERN CONSTRUCTION COMPANY, INC. (L. S.)

By s/ R. J. BAXTER,
Sec.-Treas.

s/ S. J. PICKARD (L. S.)
S. J. PICKARD, doing business as Pickard Engineering Company.

Witnesses:

s/ NELLY M. ROBERTSON,
s/ MARY L. SENN.

Witnesses:

s/ MARY D. HICKEY,
s/ BETTY ANNE MURPHY.

Robert H. Winn joins in this agreement for the purpose of agreeing to and being bound by the provisions of paragraphs 2 and 3 of said agreement.

In Witness Whereof, said Robert H. Winn has hereunto set his hand and seal, this 7th day of October, 1955.

s/ ROBERT H. WINN (L. S.)
ROBERT H. WINN.

Witnesses:

s/ MARY D. HICKEY,
s/ BETTY ANNE MURPHY.

RCN-V- 10-15-55

This Addendum to the Agreement entered into on October 7, 1955, between Southern Construction Company, Inc., and S. J. Pickard, doing business as Pickard Engineering Company, made and entered into this ..... day of October, 1955,

Witnesseth:

There is hereby added to paragraph 3 of said original agreement, in the same manner and to the same extent as

[fol. 96] if the same were originally included therein, the following:

The agreement by Southern to furnish funds for meeting labor payrolls on the Fort Benning jobs is based upon representation by Pickard that the total sum for said labor, beginning with the payroll of October 7, 1955, shall not exceed Sixty Thousand Dollars ($60,000.00), and there shall be no obligation on Southern to furnish any sum for labor in excess of said amount; and in the event that prior to completion of said job it is clearly evident that this sum as represented by Pickard is not sufficient to complete said job, Southern shall have the right to notify Pickard of this fact, and in the event Pickard cannot prove to the satisfaction of Southern that said sum is sufficient to complete said job, Southern shall have the right to discontinue further advances for labor.

In Witness Whereof, Southern has caused this addendum to be executed by its duly authorized officer, and Pickard has hereunto set his hand and seal, all in duplicate, this ..... day of October, 1955.

SOUTHERN CONSTRUCTION COMPANY, INC. (L. S.)

By s/ R. J. BAXTER,
Sec.-Treas.

s/ S. J. PICKARD (L. S.)
S. J. PICKARD, doing business as Pickard Engineering Company.

Witnesses:

s/ MRS. MARY L. SENN,
1806 Bunting Dr.

Witnesses:

s/ MOLLY MCMULLEN ROBERTSON,
243 Telfair St.

[fol. 97]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT No. 2

1000 Shoreham Building
Washington 5, D. C.
Metropolitan 5-4350

135 South LaSalle Street
Chicago 3, Illinois
Financial 6-3827

Law Offices
Hamel, Park & Saunders
Washington

Charles D. Hamel
Lee I. Park
Benj. H. Saunders
F. Weaver Myers
(1906-1952)
Howard T. Mathier
K. Martin Worthy
Fuller Holloway
Robert H. Winn
Arthur Peter
James M. Williamson
Louis A. Fernandez
Counsel.

John Enrietto
F. C. Niswander
James P. Jones

November 14, 1955.

Southern Construction Company
c/o Hull, Willingham, Towill & Norman
Suite 1013
Southern Finance Building
Augusta, Georgia.

Gentlemen:

Pursuant to my recent telephone conversation with Mr. Norman, I am including herein a statement of the amounts [fol. 98] due and owing to material men and sub-contractors other than Atlas Supply Company on the Benning and

Campbell jobs by Pickard Engineering Company under the sub-contracts which they hold with you on these operations.

Fort Benning

Clarke Baridon	$ 7,162.97
Columbia Plumbing & Heating	770.95
Columbus Welding Supply Co.	116.51
Con-Tex Industrial Supply Co.	147.85
Jenkins Electric Company	994.37
Moss Construction Company	404.50
Sungas Service, Inc.	107.12
Wilmark Seal Company	393.97
	$10,098.24

Fort Campbell

Crane Co.	$ 126.40
Elder-Conroy Hardware Co.	95.28
Riley Hardware Co.	24.70
Warren Paint & Color Co.	9.01
	$ 255.39

If you will send a check for these items, I will see to it that they are paid immediately. If you desire to have me as one of the payees on the check that will be satisfactory to me.

The checks for the difference between the net pay-roll and the gross payroll are coming in very slowly. For instance, the check for the payroll for the last week in October has not yet been received. This forces Pickard [fol. 99] Engineering Company to keep its books open well into the succeeding month. We would appreciate it if these checks could be sent promptly at the time the payroll payments are made.

Very truly yours,

ROBERT H. WYNN.

11/14/55.

I certify that the above-stated accounts are due and owing on the Fort Benning and Fort Campbell jobs, respectively, under the sub-contracts I hold with Southern Construction Company.

PICKARD ENGINEERING COMPANY.

By S. J. PICKARD.

RHW:mdh

[fol. 100] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

For the Middle District of Tennessee,
Nashville Division.

Civil Action No. 2357.

THE UNITED STATES OF AMERICA for the Use of SAMUEL J. PICKARD, Doing Business as PICKARD ENGINEERING COMPANY, 6230 Third Street, Northwest, Washington, D. C.,

Plaintiff,

vs.

SOUTHERN CONSTRUCTION CO., INC., Old Savannah Road, Augusta, Georgia,

and

CONTINENTAL CASUALTY COMPANY, Chicago, Illinois,

Defendants.

COMPLAINT ON A PAYMENT BOND FOR MONEY DAMAGES UNDER THE PROVISIONS OF TITLE 40, U. S. C. A., SECTION 270 (b), THE MILLER ACT—Filed April 4, 1957

1. Jurisdiction is based on the provisions of Title 40, U. S. C. A., Section 270 (b), the Miller Act.

2. Plaintiff is a solely owned proprietorship with principal offices at 6230 Third Street, Northwest, Washington, District of Columbia; defendant Southern Construction Co., Inc., is a corporation of the State of Georgia, with [fol. 101] principal offices at Old Savannah Road, Augusta, Georgia; and defendant Continental Casualty Company is a corporation of the State of Illinois, engaged in the surety or bonding business, with principal offices at Chicago, Illinois.

3. Defendant Southern Construction Co., Inc., entered into a contract with the United States, acting through the Office of the Post Engineer, Fort Campbell, Kentucky-Tennessee, providing for the Improvement of 10-74 Man Type Barracks at Fort Campbell, Kentucky-Tennessee, the contract being identified as Contract No. DA-15-056-A 111-112, and shortly thereafter, on May 5, 1955, defendant Southern Construction Co., Inc., entered into a contract with plaintiff, as a subcontractor, to do all the plumbing and heating work provided for in the specifications of the prime contract, the price of said subcontract being Fifty Thousand Dollars ($50,000.00).

4. Under the terms of the aforesaid subcontract, defendant Southern Construction Co., Inc., was obligated to pay plaintiff for the work as it progressed, and this it failed to do. Instead, defendant Southern Construction Co., Inc., unreasonably and without just cause withheld for unduly long periods of time large sums of money which plaintiff had earned, in violation of its payment obligations, thus rendering it impossible for plaintiff to meet its payment obligations to its suppliers and its labor and materialmen.

5. Although plaintiff made prompt and timely demand for payment, both orally and in writing, full payment of earned money was refused. In an effort to remedy the conditions of financial stress created by these wrongful acts of the defendant, Southern Construction Co., Inc., the parties met on or about the 7th day of October, 1955, with the result that a Supplemental Agreement was executed on that date providing, among other things, that said defen- [fol. 102] dant would release to plaintiff sufficient money to meet its payrolls each week, up to a stated maximum, and providing further that said defendant would turn over to

plaintiff funds for payment of all plaintiff's suppliers and materialmen as such funds became available from the United States. Defendant Southern Construction Co., Inc., wholly failed to meet its obligations under the aforesaid Supplemental Agreement.

6. Aside from the foregoing failure of defendant Southern Construction Co., Inc., to abide by its contract, as amended, plaintiff prosecuted its contract to substantial completion. For so doing it received one progress payment in the amount of Thirteen Thousand Dollars ($13,000.00), thus leaving a net contract balance due and owing at this time of Thirty-seven Thousand Dollars ($37,000.00).

7. Under date of April 28, 1953, a payment bond in a penal sum of One Hundred and One Thousand Nine Hundred Sixty-seven Dollars and Fifty Cents ($101,967.50) was executed by defendant Southern Construction Co., Inc., as principal, and by defendant Continental Casualty Company as surety, the condition of which bond was that the aforesaid principal and surety would promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the contract hereinbefore described in Paragraph 3 of this Complaint.

Wherefore, the premises considered, plaintiff prays as follows:

1. That process issue out of this Honorable Court directed to each of the defendants, commanding them and each of them to appear and make answer to this Complaint, and to abide by and perform the orders and decrees of this Court in the premises.

[fol. 103] 2. That plaintiff be awarded judgment against defendants in the amount of Thirty-seven Thousand Dollars ($37,000.00), with interest and costs.

3. That plaintiff have such other and further relief as the case may require, and to this Court may seem meet and proper.

MADDEN and MADDEN,
By JOHN K. MADDIN, JR.,
1218 Stahlman Building,
Nashville, Tennessee.

Of Counsel:

EDWARD GALLAGHER,
1216 Wyatt Building,
Washington 5, D. C.

Attest: A True Copy.

L. B. ORMES,
Clerk, U. S. District Court,
Middle District of Tennessee,
By ROY CARMAN,

(Seal) D. C.

[fol. 104]

IN UNITED STATES DISTRICT COURT

For the Middle District of Tennessee,
Nashville Division.

Civil Action No. 2357.

[Title omitted]

Before

The Honorable William E. Miller, Judge of said Court, at Nashville, Tennessee, on February 12 and 17, 1960, on Oral Arguments.

Appearances:

For the Plaintiff: John K. Maddin, Jr., Esq., Attorney at Law, Stahlman Building, Nashville, Tennessee, Edward Gallagher, Esq., Attorney at Law, 1216 Wyatt Building, Washington, D. C., George Grant, Esq., Attorney at Law, Macon, Georgia.

For the Defendants: Harry D. McCowen, Esq., Attorney at Law, 1111 Hurt Building, Atlanta, Georgia, Wm. J. Harbison, Jr., Esq., Robt. C. Taylor, Esq., Robt. W. Sturdivant, Esq. (only on Feb. 17, 1960), Attorneys at Law, Life and Casualty Tower, Nashville, Tennessee.

[fol. 105]

Transcript of the Court's Statement From the Bench

Nashville, Tennessee,
February 17, 1960.

The Court: I approach this case with the realization of the fact that all attorneys involved have given it very careful consideration and that it has been ably tried and presented both to the jury and to the Court. I very much appreciate the exhaustive briefs which have been supplied to the Court by the respective parties which have been most helpful.

This case is one in which a jury was called for and certain issues were submitted to the jury to be answered.

I have reached the conclusions that I have in this case, finding it unnecessary to disturb any of the findings made by the jury.

The first matter before me grows out of the motion made by the defendants, Southern Construction Company and Continental Casualty Company, for a directed verdict. That particular question will be the one which I will address myself to first.

The first issue submitted to the jury was this: "Did the defendant, Southern Construction Company, Inc., by so conducting its own operations interfere with the plaintiff Pickard in the performance of his work?" The jury answered that question, "No."

In accordance with the instructions of the Court and as the evidence developed, that particular issue dealt with the proposition advanced by the plaintiff that the Southern Construction Company had interfered with the work of Pickard in that it had so conducted its own operations by faulty scheduling and so forth and by being guilty of cer-

[fol. 106] tain delays and by not having its other work ready at the proper time, that Pickard was interfered with and prevented from carrying out his part of the bargain. There was evidence pro and con on that issue, and the jury answered it, "No," said that there was no interference. So that disposes of that particular phase of the case. There is material evidence in the record to support the finding of the jury on that proposition.

The second issue is as follows: "Did defendant, Southern Construction Company, Inc., fail to pay plaintiff Pickard or the suppliers or materialmen of Pickard as it received payments from the Government for work performed by Pickard?" The jury answered that particular question, "Yes." In other words, what this finding of the jury amounts to is that, in accordance with the terms of the supplemental agreement of October 7, 1955, there were payments received by Southern Construction Company from the Government which covered work which had been performed by Pickard as a subcontractor and that as those payments were received, they were not made to Pickard, were not paid over or transmitted to Pickard. The jury found that as a fact.

As I will point out later, I find it unnecessary in the conclusions I have reached to disturb that particular finding of the jury.

The third issue which is related to the second is as follows: "If you answer either Question 1 or 2, 'Yes,' was plaintiff Pickard induced to leave the work, either by defendant interfering with his work or by its failure to make payments required by the contract?" The jury answered that question, "Yes." In other words, the jury found that Pickard left the contract and gave it up in December of 1955 because he had not received payment in accordance with the terms of the supplemental agreement of October 7, 1955; that is, he had not received pay-
[fol. 107] ment as payment was received by Southern from the Government, and that that was the reason he left.

I find it unnecessary to disturb that finding.

We will assume, for purposes of argument, that the two findings are supported by the evidence. The question then arises: "Was the breach of contract involved of such material character that it gave to Pickard the right to abandon the contract?" That is the next question that would have to be answered. As I view it, that is a question of law to be answered by the Court. It is not a factual issue to be answered by the jury.

My first reaction to this question was that this was such a material breach as would warrant Pickard in abandoning the contract and not carrying it out to final comple-

tion, but I have reexamined this issue after the oral arguments the other day and after receiving the briefs and after having fully considered them and after having done considerable research on the proposition; and I am compelled in the light of this investigation to the conclusion that, under the controlling facts of this particular case, which are not disputed, and under the facts found by the jury and consistently with the findings of the jury, there was not such a breach by reason of failure to pay on the part of Southern Construction Company as would give Pickard the right either to abandon the contract or to rescind the contract.

On that point, the law seems to be fairly well settled, and I will quote some passages from American Jurisprudence at this point, although there are other authorities which could be cited to the same effect:

Of course, it is well recognized that under certain conditions a breach of contract by one party may warrant a rescission of the contract or an abandonment of it on the part of the other party to the contract. However, the rule is (and I am quoting from 12 American Jurisprudence under the heading of "Contracts," Section 440):

[fol. 108] "A rescission is not warranted by a mere breach of contract not so substantial and fundamental as to defeat the object of the parties in making the agreement. Before partial failure of performance of one party will give the other the right of rescission, the act failed to be performed must go to the root of the contract or the failure to perform the contract must be in respect of matters which would render the performance of the remainder a thing different in substance from that which was contracted for."

And reading from the same text in the footnote, which is Footnote No. 15, the same section and the same text, the following appears:

"The failure to perform a contract never affords ground for rescission, unless it is such as to defeat the object of the contract, and not simply to go to a subsidiary part of it, which can be fully compensated in damages."

Further, reading from the same textbook and the same section, 440, at page 1022, the following similar statement is found:

"The right to claim a discharge of the whole contract depends, not on whether the act constituting the breach was inconsistent with the terms of the contract, but whether it was inconsistent with an intention to be further bound by its terms or whether the breach was such as to defeat the purpose of the contract."

So, from those quotations (and I think they are thoroughly supported by the authorities and by many other authorities which could be cited) in order for a breach of contract to warrant a rescission or to warrant the other party in rescinding it or in abandoning it, the breach must be so substantial that it goes to the very root of the contract and is of such character as to defeat the very purpose of the contract itself.

That brings us to the facts of this particular case with the inquiry: Was this breach, which the jury found did [fol. 109] exist, of that character? Did it go to the root of the contract under the circumstances of this case? Was it so material that it defeated the very purpose of the contract, the purpose for which the contract was entered into?

With that inquiry in mind, I have made a careful examination and analysis of this supplemental agreement, of October 7, 1955, to determine just what its purpose was; more particularly, the language contained in paragraph 5 relative to payments as received from the Government.

We must remember in construing this contract and in determining its purpose some of the background that led up to it. In the first place, the main contract, subcontract between Southern and Pickard, had already been entered into; and it developed later that Pickard was unable to supply a bond as required under the terms of the subcontract. For that reason and for other reasons, the parties entered into the agreement of October 7, 1955, which the Court has already found and finds now related to both the Fort Benning project and the project at Fort Campbell.

It must be borne in mind at all times, and this is of much significance, that under the Miller Act, if a material-

man or supplier of the subcontractor was not paid, if he furnished supplies to the job and his bills were not paid and his accounts were not taken care of by Pickard, then the supplier would have had a valid claim and an enforceable claim against the Southern Construction Company as the prime contractor. So it was incumbent upon Southern Construction Company, since Pickard could not furnish a bond, to take such steps as would be necessary to protect itself, in other words, to take precautions to see that all materialmen and suppliers of Pickard were paid and that their accounts were taken care of.

With that in mind, this paragraph 5 was inserted in the contract which reads as follows:

"Southern hereby waives Article 12 of each of its subcontracts, requiring payment or performance bonds, and [fol. 110] Pickard hereby waives all claims against Southern as a result of the withholding of any funds due Pickard on requisition in lieu of bond and further agrees and authorizes Southern to withhold all other and further payments on work now completed or to be completed during the course of said jobs, until the completion of each said job by Pickard and the final acceptance and payment thereof by the Army to Southern, excepting only the payments herein agreed to be made plus additional payments which will be made by Southern either jointly to Pickard and to subcontractors or materialmen, or to Pickard, as Southern is paid on requisitions which include labor and/or material furnished by such subcontractors and/or materialmen. All sums paid heretofore, herewith or hereafter by Southern to Pickard or for the account of Pickard shall be applied against the total contract price due to Pickard on said jobs."

In view of the clear purpose of this contract to protect Southern with respect to the claims of materialmen and suppliers of Pickard and in view of the language employed in the contract itself, I think the meaning of this contract is that Southern, with respect to these payments made by the Government, was given an option. In other words, it was given a right of choice to determine whether to make the payments to Pickard alone or whether to

make the payments to Pickard and to the materialmen and the suppliers of Pickard jointly. It had those two choices under this contract and the option rested with Southern Construction Company.

It seems to me that the obvious purpose of this option being vested in Southern was to give Southern the right to make payment to Pickard alone if Southern was satisfied that all bills, materialmen's bills and suppliers of Pickard, had been paid and satisfied. If evidence could be supplied to Southern that that was true, that Pickard's [fol. 111] suppliers had all been taken care of, then Southern had a perfect right, if it saw fit, to go ahead and make the payment directly to Pickard.

But to guard against the possibility that these bills were not paid, the contract says that Southern has the other choice, that is, to make the payment jointly to Pickard and to the materialmen. It seems to me that the unmistakable purpose of this provision was to give Southern the means of seeing that any payments which it made, even though Pickard's name would have to be included as one of the payees, actually went to pay the bills of suppliers of Pickard.

So that the result of the contract is that when Southern Construction Company received these payments from the Government, the only circumstance under which or condition upon which Pickard would have the right to say, "You pay me alone; let me have the payment", would be proof of the fact that all materialmen's claims and suppliers' claims had been fully paid and satisfied. As long as there was an outstanding bill involved, then he had no right other than to have the payment made to himself and to the suppliers for the protection of Southern Construction Company and for the protection of the suppliers. In other words, if there was an outstanding bill, then Pickard had no right to receive any free money under the terms of this contract.

The undisputed facts in this case show that there was a bill of Atlas which was the principal supplier of Pickard in the amount of approximately $34,500 which was outstanding when these payments were received by Southern Construction Company from the Government. Therefore,

at that time, when these payments were received by Southern from the Government, Pickard had no right to receive that money himself personally as free money. The only right he had was to have that money applied to the pay- [fol. 112] ment of the claims of suppliers or materialmen consistently with the terms of the agreement itself.

In this particular case, the question is: Is this a material breach? It all comes back to that one proposition.

If this contract meant that this money was to be paid over to Pickard as free money (that is, money that he could apply to any purpose that he saw fit), then it may be very well argued that the Guerini case, decided by the Supreme Court of the United States, and cases of like import, would be applicable, and that this would be such a material breach of contract as would warrant Pickard in abandoning the contract or rescinding it. That could be argued. And it may be conceded at the present time for purposes of argument that if that were the true situation, the doctrine of the Guerini case would apply and that there would be a material breach. But that is not this situation as the Court sees it.

The situation here is that this money received from the Government was not money which Pickard was entitled to have paid to him. It was money which, under the terms of this supplemental agreement of October 7, 1955, Southern had the right to see was paid to the materialmen or the suppliers in order to relieve Southern of its own liability under the Miller Act.

Therefore, I am of the opinion that the Guerini case and cases of like holding are not in point in this instance and that the failure to make this payment to Atlas Supply Company and Pickard would be a material breach of contract only if it in some way interfered with Pickard in preventing him from carrying out the contract or from performing or completing his duties under the contract.

The undisputed facts in this case are that there was no interference with Pickard in carrying out his contract insofar as his suppliers were concerned. There was no interference by reason of failure to pay a supplier, includ- [fol. 113] ing Atlas Supply Company or any other supplier. There is no proof to show that any supplier refused to

furnish him with any supplies or materials or anything that he needed to carry out his contract and to prosecute it on to final completion.

On the contrary, the evidence supports the finding in the case that all suppliers were willing to cooperate with him and to supply him with what he needed to complete the project. Of course, they knew that they had adequate protection against the Southern Construction Company which was a bonded company under this particular job. So there is absolutely nothing whatsoever to support a conclusion in this case that the failure to pay Atlas or any other supplier in any way, shape or form interfered with Pickard in completing his contract.

Furthermore, the evidence in this case shows that Pickard carried this contract almost to final completion. The very lowest percentage which the record would justify would be 96% completed. There is some evidence to show that it was even carried to a greater extent than that. But we will assume that it was 96% completed. That means that the $50,000 contract was completed all but four percent by Pickard at the time he walked off the job without any notice to anyone of an intention to rescind or to abandon the contract.

So I conclude that, even though the jury has found that there was a breach of contract and that Pickard left the job because this payment was not made to him, as a matter of law such breach did not vest in Pickard under the particular circumstances of this case (where there was no interference with his performance by failure to pay any supplier and where the project was almost carried to final completion and in fact was substantially completed) the right to rescind or abandon the contract.

Another question has been briefed and argued, and I thought it was probably a serious question in the case, [fol. 114] about whether or not there was a waiver of the right to rescind by reason of long delay coupled with a change of position on the part of Southern Construction Company.

There is some confusion in the cases, and they have to be read carefully and thoroughly in order to come to the correct rule of law which is applicable in a case of this

kind. There is considerable authority to the effect that if a party has the right to rescind a contract and actually leaves it and abandons it, he does not surrender the right of rescission by later suing on the contract itself to recover the contract price or even by long delay. There is an abundance of authority, somewhat to my surprise as a matter of fact, to support that rule, that delay alone and suit on the contract, thereby affirming it, are not sufficient acts to constitute a waiver of the right of rescission unless there is some change of position by the other party to his detriment in the nature of an estoppel. But I find it in this case unnecessary to go into that proposition whether there has been a waiver of the right of rescission since I conclude that there has not been such a material breach in this particular case, construing the agreement as I construe it, and on the basis of the undisputed facts, as would warrant a right of rescission.

That means that there is no right of recovery on a quantum meruit basis, and consequently it is unnecessary to discuss the finding of the jury number 4 to the effect that it required $61,000 to do Pickard's work under the subcontract.

I do find, however, that notwithstanding the fact that the plaintiff has claimed the right to sue for quantum meruit, if there is any amount remaining unpaid under the contract, the plaintiff would be entitled to recover the balance due. I think under the liberal rules prevailing in the federal courts that the Court should grant the plaintiff any relief which might be indicated by the facts of [fol. 415] the case regardless of the formal position which the plaintiff has taken with respect to his right of recovery; that is, the theories advanced by the plaintiff to support his right of recovery.

We come now to one of the most troublesome questions in the case, and that is the question of this counterclaim. I think the Court and the attorneys have both been going around in circles on this proposition. It is an intriguing question, and it is a novel question. This comes about because the particular factual situation here involved is unusual.

The ordinary counterclaim situation, of course, is a single transaction situation, with two or more claims. Say A and B are involved in an automobile collision and both of them are seriously injured. If A sues B in a federal court, B has to counterclaim for his personal injuries because his personal injuries grow out of the same transaction as the subject matter of A's suit for personal injuries. That is an easy situation because it is a single transaction.

Rule 13 (a) reads as follows: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

That is the pertinent rule, and subsection (b) provides for a permissive counterclaim: "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

[fol. 116] As I say, it would be a very simple proposition if you had one transaction involved, but in this particular case it turns out that there are two separate and distinct transactions involved between the same parties, one transaction being the Fort Campbell project for the construction or the renovation of the barracks buildings at Fort Campbell, and the other project being the construction of the barracks buildings at Fort Benning. So you have two separate and distinct transactions, but a claim which grows out of both transactions. You have a counterclaim which is common to both the Fort Benning and Fort Campbell contracts.

So it arises out of the transactions or occurrences at both Fort Campbell and Fort Benning. It is therefore, very appropriately connected with both lawsuits, both causes of action. I do not see how one could possibly say that, within the sense and meaning of the counterclaim

rule, this claim does not grow out of both transactions rather than just one of them because (as very well stated in the briefs) it was one indivisible payment that was made to settle both accounts of Atlas Supply Company against Southern growing out of both jobs. It was unallocated by anyone. It was not allocated to Fort Benning; it was not allocated to Fort Campbell. It was simply accepted and received as one indivisible, over-all payment which constituted a complete release of any liability of Southern to Atlas Supply Company growing out of both jobs and both transactions. So we can very well say that here we have two transactions between the same parties and a claim of one party against the other which grows out of both transactions.

It could have happened that those two lawsuits could have been filed simultaneously in Georgia and in Tennessee. That could very easily have been done, filed the same day as far as that is concerned. But in this particular [fol. 117] case, the plaintiff made a mistake and filed his cause of action for both projects in federal court for the Middle District of Georgia; and for jurisdictional reasons, under the Miller Act, the plaintiff later had to separate those two claims into two separate lawsuits, leaving the Fort Benning job as the subject matter of the lawsuit in Georgia and filing a separate and independent suit in the Middle District of Tennessee in connection with the Fort Campbell project.

So the two lawsuits were separated by the plaintiff as they should have been separated from the very beginning. Therefore, you have on the face of it a situation where Rule 13 (a), according to its explicit terms, applies to this claim both in the Middle District of Tennessee and in the Middle District of Georgia. In other words, the rule says that if the claim grows out of the same transaction, then it must be pleaded in that particular action, which means, as I construe it, in this particular situation and as applied here, that when the suit was first filed in Georgia, the defendant was required to file this Atlas claim of $35,000 in the Georgia case just like the defendant, Southern Construction Company, did. That was a compulsory counterclaim because it grew out of the Fort Benning job.

When the suit was separated and filed on the Fort Campbell job in Tennessee, then Rule 13 (a) required the defendant, Southern Construction Company, also to plead the same claim in the federal court in Tennessee, because this claim also grew out of the transaction which constituted the subject matter of the Tennessee suit.

So the defendant, Southern Construction Company, was required to plead it in both cases, which was done.

Obviously, only one court could adjudicate it, and it appears in this particular case (and I went very carefully into this proposition as I recall it) that while the claim [fol. 118] was pleaded in Georgia in the beginning as a counterclaim, it actually did not constitute a part of the claim which was submitted to the jury for determination. It was not, as a matter of fact, adjudicated by the Georgia Court and has never been adjudicated by any court to this day. I think the clear inference from the record is to that effect, that the Georgia Court did not actually adjudicate it.

Of course, if it had been adjudicated down there and had been determined in the Georgia federal court, one way or another, then on proper motion here, it could not be litigated a second time in the Tennessee Court; but it seems to me that under the very terms of Rule 13 (a) this court has jurisdiction of this counterclaim since it grows out of the same transaction, and has not been adjudicated by any other court. This court has jurisdiction of it because the Southern Construction Company was required by Rule 13 (a) to plead it in this Tennessee lawsuit and, therefore, the Court has the right to adjudicate the claim to determine whether or not it is a valid counterclaim and, if so, to give credit for it as a payment.

I do not go along with the argument that there is some difference between a payment and a counterclaim. I think the term "counterclaim" is comprehensive and includes offsets and recoupments, whether they go to extinguish a liability, or to diminish it. It is all comprehended within the term "counterclaim". I accept that thesis of the plaintiff.

But let us go a little bit further. Moore's Federal Practice (Volume 3, under this Rule 13 (a), Section 13.14,

Subsection 2) deals with the exception contained in Rule 13 (a) to the effect that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

[fol. 119] You might argue from that that at the time the Tennessee lawsuit was filed, this counterclaim was the subject of another pending action. That phase of the matter has occurred to the Court and has been considered, and it might be argued that therefore it was not a compulsory counterclaim in Tennessee. But if that be accepted as true (and the facts in this case do show that when the Tennessee case was filed, this counterclaim was the subject of another pending action in the sense that it had been set up as a counterclaim in the Georgia case), the question then arises, if it was not required to be pleaded in the Tennessee suit by reason of this exception, could it have been pleaded permissively as a counterclaim by the defendant? And I reach the conclusion that it could have been pleaded in the Tennessee suit because it grows out of the same transaction, and if it be, for purposes of argument, accepted that it was then the subject of another pending action, that may take it out of the compulsory category but would leave it as a permissive counterclaim to be appropriately pleaded in the Tennessee case.

The key to that is a somewhat analogous situation set out in this text in Moore's Federal Practice, Section 13.14, Subsection 2, at page 37; and I will read a part of that. I think it will very clearly appear that this is a parallel situation.

(Reading) "A claim which is the subject of a pending action need not be pleaded although it does arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. Thus assume P and A are in an auto wreck and both seriously injured and that A sues P for personal injuries in a state court. Then subsequently P sues A for personal injuries in a federal court. Although A's claim for personal injuries arises out of the transaction or occurrence which is the subject matter of P's claim in the federal court, A need not plead such a claim, [fol. 120] because his claim is the subject of an action already pending in another court. The next question is: May

he do so? The policy underlying Rule 13 would permit him, if he so desired, since the exception runs in A's favor and hence he should have the option to avail himself of it or not."

In other words, the exception says that such a claim "need not" be so stated. So the option is in favor of the party claiming the right of counterclaim and if he sees fit to plead it, he may do so. I think that is analogous to the situation here, that this counterclaim was pending in Georgia and, therefore, it may be argued that it was not required to be pleaded in Tennessee, but it could have been pleaded appropriately because it grows out of the same transaction.

There are other statements in the text immediately following what I have just stated which support this same general idea.

Footnote 9a reads as follows: "*If A commences action* in a federal court before P institutes his proposed federal action, multiple litigation should not be countenanced. Rule 13 applies in all federal courts and P should counterclaim in A's action. If P, in addition to counterclaiming, institutes a federal action A should be able to have it abated, certainly, where both actions are pending in the same federal court; and at least have P's action stayed if brought in another federal court."

Footnote 6 reads: "If P sues A in a federal court, Rule 13 (a) contemplates that A must counterclaim for his injuries in P's action, although the Rule does not preclude A from also instituting an action for such injuries in either a state or federal court. A's independent action would be subject to the state law on the subject of another action pending, for which see another section which is cited.

[fol. 121] So I conclude in this particular case that due to the unusual facts involved where there is a claim which is common to both the subject matter of the suit in Tennessee and in Georgia, such claim, if not required to be pleaded as a counterclaim in Tennessee, could have been pleaded in Tennessee permissively and could appropriately be adjudicated by this Court if not previously adjudicated by the court in Georgia.

Furthermore, I think it would be a manifest injustice if the Court should reach any other conclusion in this case, as the facts show that credit has never been given for this payment of $35,000. It has never been adjudicated by any court, and it would be wrong to reach a result which would preclude the Southern Construction Company from getting credit for a payment which was admittedly made and which almost paid in full the entire job at Fort Campbell after considering the previous payment of some $13,000 which had already been made. It would be a wrong result to reach and, as I see it, Rule 13 (a) does not require that result where there are two actions pending in different federal courts with one counterclaim common to both transactions. I think it is an equitable result, a fair result, and it is a result in keeping with the law and with the letter of Rule 13 (a). I do not find it necessary to stretch the language or purpose of the rule itself to reach this result.

Going back to what I said a moment ago, if the plaintiff had done what the plaintiff should have done and had filed both suits in the separate federal courts simultaneously or practically simultaneously, then there would not have been any doubt that this would be a compulsory counterclaim in both cases under Rule 13 (a). Of course, appropriate steps could be taken perhaps by one court to stay its hand and let the other court adjudicate it or something of that nature, but certainly, if one court has [fol. 122] not adjudicated it, the other federal court is not deprived of the right to adjudicate the counterclaim.

So I find that the defendant, Southern Construction Company, is entitled to credit for this payment.

I do not know how that leaves the account. In dollars and cents, what does that mean? You have paid the— I will allow this counterclaim to the extent of whatever it is: $34,500 and some odd cents?

Mr. Harbison: Yes, sir.

The Court: Then you paid $13,000, did you not?

Mr. Harbison: Yes, sir.

The Court: That is $47,000. Were any other payments made?

Mr. Harbison: It was stipulated that $2,000 was paid to Clarke Baridon, and our notes at least indicate (we can check the records to be certain) that $1,390 was paid to Jenkins Electric Company. That puts it over $50,000.

The Court: That puts it over the $50,000. You can set that out in the findings of fact.

The counterclaim, insofar as it exceeds the amount, I think the jury found against you on that anyway, did it not?

Mr. Harbison: I think it would leave us with about $2,000 due.

The Court: In open court, that was waived, so there will not be any excess recovery allowed on the counterclaim. I think that disposes of all questions involved.

* * * * * * *

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 123]

IN UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE,

NASHVILLE DIVISION.

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. The Pleadings and Nature of the Case.

1. This suit was filed on April 4, 1957 in the name of The United States of America for the use of Samuel J. Pickard, doing business as Pickard Engineering Company, 6230 Third Street, N. W., Washington, D. C. The named defendants were Southern Construction Company, Inc., of [fol. 124] Augusta, Georgia, and the Continental Casualty Company of Chicago, Illinois. For convenience the plaintiff will herein be referred to as Pickard and the defendant Southern Construction Company, Inc., as Southern.

2. The suit was filed under the provisions of the Miller Act, 40 U. S. C. A. 270 (b). Plaintiff alleged that Southern

Construction Company was the prime contractor on a project for the rehabilitation of certain barracks at Fort Campbell, Tennessee, and that on May 5, 1955 plaintiff entered into a subcontract with Southern to do all the plumbing and heating required in the specifications of the prime contract, the price of the subcontract being $50,000.

3. Plaintiff alleged that under the said subcontract Southern Construction Company failed to make the required progress payments to plaintiff as the work progressed, and that without justification it withheld funds from the plaintiff for long periods of time, rendering it impossible for plaintiff to meet its payment obligations to its suppliers, labor and material men.

4. Plaintiff alleged that in an effort to remedy the financial stress brought on by the alleged wrongful conduct of Southern, the parties entered into a supplemental agreement dated October 7, 1955 which required Southern to turn over to plaintiff funds for the payment of plaintiff's suppliers and material men as such funds became available from the United States. Plaintiff alleged a breach of these payment provisions on the part of Southern.

5. Plaintiff alleged that despite the failure of the defendant to abide by this contract, plaintiff prosecuted the work to substantial completion but received from the defendant only one progress payment in the amount of $13,000. Plaintiff sued for the specified contract price of [fol. 125] $50,000, less said payment of $13,000. He alleged that Southern Construction Company was bonded on this job by the Continental Casualty Company, said bond being the required statutory bond for government contracts, and plaintiff alleged that Continental Casualty Company was liable for the sums due to plaintiff.

6. In October, 1957 Southern Construction Company filed an answer denying the allegations of the complaint, and alleged that the plaintiff himself had defaulted in the performance of the Fort Campbell project, and had also defaulted on some work being carried on by the plaintiff under subcontract with the defendant at Fort Benning,

Georgia. Defendant alleged that it had paid to the plaintiff or on his account on both jobs sums exceeding the contract prices on said jobs by the amount of $86,818.63, for which the defendant demanded judgment.

7. In June, 1959, at a pre-trial conference in this cause, the plaintiff sought and obtained leave to amend his complaint so as to allege that the supplemental agreement of October 7, 1955, above referred to, did not pertain to the Fort Campbell project. Plaintiff further alleged that the defendant disregarded all of the pertinent provisions of said supplemental agreement. In the amended complaint plaintiff further alleged that except for a few minor details he completed his contract work. He alleged that it became impossible to complete these details because of virtual abandonment of the prime contract by Southern. He also alleged that between commencement and completion of plaintiff's work there were extended periods of time when the work was at a standstill because of temporary abandonment of the prime contract. Plaintiff therefore alleged that these acts on the part of Southern, coupled with its failure to make payment, constituted breaches of contract by Southern justifying relief to the [fol. 126] plaintiff on a quantum meruit basis. Plaintiff therefore struck the prayer for relief in the original complaint and sought judgment for the reasonable value of his work and materials, in the amount of $100,310.08 with interest and costs.

8. Defendants filed an amended answer and counterclaim, denying the allegations of the amended complaint, and alleging that on the Fort Campbell project defendant Southern had expended in payments to the plaintiff or on his behalf the sum of $57,412.27, or $7,412.27 in excess of the contract price, for which the defendant sought judgment against the plaintiff.

9. As a result of the pre-trial conference between the parties, a pre-trial order was entered on July 31, 1959 setting out the contentions of the parties and the issues. Plaintiff was granted in said pre-trial order the right to file an amended answer to defendant's counterclaim setting up an affirmative defense of res adjudicata.

10. At the pre-trial conference in June, 1959 plaintiff requested a trial by jury, which request was granted by the court. The cause was tried before the court and a jury in September, 1959, at which time the court submitted six interrogatories to the jury for answers. No general verdict was taken from the jury. By stipulation of the parties, one of the principal issues in the case was reserved for decision by the court on all questions, both law and fact, and was not submitted to the jury.

B. Findings of Fact.

It is undisputed in the evidence that Southern Construction Company was the prime contractor for the rehabilitation of certain barracks at Fort Campbell, Tennessee, under contract with the United States Army. Continental Casualty Company furnished the requisite performance [fol. 127] bond for Southern on this job, and the usual payment bond, guaranteeing payment by Southern for all labor and materials used in the work.

The subcontract between Southern and Pickard was dated May 5, 1955 and is in the record. Under Article X of this contract Southern agreed to make payments to Pickard as the work progressed; but this article expressly provided that the prime contractor should retain 10% of each progress payment until completion of the work, and it further provided that the prime contractor could withhold payment of any estimate until the subcontractor had furnished suitable evidence that he had paid in full for all labor, materials and supplies used in the work through the date of the estimate.

Article XII required Pickard to furnish a performance bond to Southern in the amount of $50,000, guaranteeing faithful performance of the subcontract.

Work began on the subcontract by Pickard in May or June, 1955, and continued until December 16, 1955.

Pickard was unable to furnish the required performance bond on this project, and remained unbonded throughout the course of the work.

Simultaneously with the performance of the work at Fort Campbell, Tennessee, Pickard was performing similar work on much larger subcontracts which he held with

Southern Construction Company for rehabilitation of barracks at Fort Benning, Georgia. Pickard's primary supplier on both the Fort Campbell project and the Fort Benning project was the Atlas Supply Company.

On August 31, 1955 Southern made a joint payment to Pickard and Atlas Supply Company on the Fort Campbell project in the amount of $13,000.

[fol. 128] On October 7, 1955 there was executed a supplemental agreement between Pickard and Southern, which recited that Pickard held three subcontracts with Southern at Fort Benning and one subcontract for work at Fort Campbell.

The subcontract recites that Pickard had been unable to obtain performance bonds on the various jobs and that Southern had been holding certain funds due to him in lieu of said bonds. The contract recited that Pickard was in need of funds with which to complete the jobs and to pay other bills. Accordingly the parties agreed that Southern would pay certain sums as set out in the contract to Pickard for his use and certain other sums jointly to him and to his attorney. Southern also agreed to meet Pickard's payrolls on the Fort Benning project, and Pickard, in turn, agreed to supply affidavits and detailed information as to the amounts of materials which had been furnished on the jobs by Atlas Supply Company, the amounts necessary to complete the jobs and other data concerning the work.

The material portion of the supplemental agreement, insofar as the present case is concerned is contained in the fifth paragraph thereof as follows:

> "Southern hereby waives Article 12 of each of its subcontracts, requiring payment for performance bonds, and Pickard hereby waives all claims against Southern as a result of the withholding of any funds due Pickard on requisition in lieu of bond and further agrees and authorizes Southern to withhold all other and further payments on work now completed or to be completed during the course of said jobs, until the completion of each said job by Pickard and the final acceptance and payment thereof by the Army to Southern excepting only the payments herein agreed

[fol. 129] to be made plus additional payments which will be made by Southern either jointly to Pickard and to sub-contractors or material men, or to Pickard, as Southern is paid on requisitions which include labor and or material furnished by such sub-contractors and or material men. All sums paid heretofore, herewith or hereafter by Southern to Pickard or for the account of Pickard shall be applied against the total contract price due to Pickard on said jobs."

After October 7 and prior to December 16, 1955, when Pickard withdrew from the job Southern received from the government two payments, one on October 17, 1955 in the amount of $12,002.46 and one on November 4, 1955 in the amount of $15,512.95.

On October 7, 1955, when the supplemental agreement was signed, and at all times thereafter, there was a balance owing by Pickard to Atlas Supply Company in excess of $34,350 for materials furnished on the Fort Campbell job.

After October 7, 1955, Mr. Pickard, through his attorney, Robert H. Winn, of Washington, D. C., began certifying to Southern certain accounts on both the Fort Campbell job and the Fort Benning job which should be paid, and upon receipt of this information from Pickard and his attorney Southern sent checks to Mr. Winn to pay the items certified to be due. On December 8, 1955, Mr. Winn wrote to the attorney for Southern stating that there was being prepared another list of creditors for materials or subcontract work on the two jobs, whose accounts should be paid.

This additional list of creditors was never sent, however. It is undisputed in the record that Southern paid to Pickard or for his account after October 7, 1955 prior [fol. 130] to Pickard's withdrawal from the work, the items which were listed in the letters received from Mr. Winn. On the Fort Campbell project these items totaled $255.59.

Mr. Winn wrote to the attorney for Southern stating that the Atlas account on both jobs had become quite large, and in December a conference was had between Pickard and his attorney, Atlas Supply Company and

Southern; as a result of which on December 16, 1955, Southern paid to Atlas on Pickard's account the sum of $100,000. The funds represented by this payment, however, were allocated by all parties to the Fort Benning contracts, and no part of the same has been claimed by Southern in the present case.

On December 16, 1955, Pickard's men left the job at Fort Campbell, Tennessee and were never heard from again. No notice of any sort was given by Pickard, his foremen or any representative on his behalf of the withdrawal, the purpose thereof, or the reasons therefor.

After his withdrawal from the project on December 16, 1955, Pickard was never heard from again by Southern with reference to the Fort Campbell project, until suit was filed on the contract between the parties in the Middle District of Georgia in December, 1956. In that proceeding, Pickard sued Southern and Continental Casualty both on the Fort Campbell project and on the Fort Benning contracts.

Thereafter, on April 4, 1957, Pickard filed the present suit in Tennessee on the Fort Campbell project, and it was subsequently dropped from the Georgia proceedings.

At the time when Pickard and his men withdrew from the Fort Campbell project, the work required of Pickard under his subcontract was substantially completed. According to the testimony in the case, Pickard's work was [fol. 131] at least 96% complete at the time of his withdrawal, and according to other testimony in the record the percentage of completion was as high as 98%.

It is undisputed in the testimony that any delay by Southern in making payments to Pickard or jointly to him and his suppliers after October 7, 1955, had no effect on Pickard's ability to perform the work. It is undisputed in the record that no supplier or material men withheld any necessary materials or supplies to Pickard, or even delayed furnishing them, by reason of any alleged delay by Southern in making payments allegedly due under the October 7 agreement.

There is no evidence that Pickard's labor force was interfered with or that he was in any way hindered or prevented from performing his contract by reason of any

delay on Southern's part in making payments pursuant to the provisions of the October 7 agreement. On the other hand, the record shows conclusively that Pickard's work was carried almost to final completion at the time of his withdrawal in December, 1955.

After Pickard left the job, and was not heard from further, Southern made payments to other subcontractors and suppliers to finish the remaining portions of the work. It was stipulated that Southern paid on the Fort Campbell project for work which was included in Pickard's subcontract the folowing items among others: To the Clarke Baridon Company, $2,000, Jenkins Electric Company, $1,390, Nolafid Company, $531.52.

Southern completed the work at Fort Campbell and obtained final settlement from the U. S. Government in April, 1956.

At the time when Pickard left the job there was an unpaid balance on his account to the Atlas Supply Com- [fol. 132] pany for materials furnished at Fort Campbell in the amount of $34,520. This amount remained unpaid until it was settled in August, 1956, under the circumstances hereinafter set out.

Shortly after Pickard left the work at Fort Campbell, he also left the Fort Benning project, and there has been litigation in the United States District Court at Columbus, Georgia, concerning the Fort Benning project between these parties.

In addition to the amount which was due to Atlas Supply Company at Fort Campbell, Atlas Supply Company was claiming a balance due to it from Pickard (and, secondarily from Southern under the Miller Act) of some $104,000, on the Fort Benning job.

Southern Construction Company did not dispute the amount of Pickard's bill to Atlas at Fort Campbell. However, it disputed the Fort Benning claim of Atlas in its entirety. Southern claims that accounting had not been properly made by Atlas for funds which Southern had paid to it at Fort Benning, claimed that Atlas had erroneously billed certain items to Southern on the Fort Benning project, and as testified by Mr. Baxter, an official of Southern, the account was disputed "in its entirety" insofar as Fort Benning was concerned.

With matters in this situation, in August, 1956 a conference was had between Southern officials and representatives of the Atlas Supply Company. As a result of these negotiations, Southern paid to Atlas Supply Company in August, 1956 the sum of $35,000, and obtained from Atlas a complete release of all liability of Southern on Pickard's accounts both at Fort Benning, Georgia and at Fort Campbell, Tennessee.

The check by which this payment was made is in the record, and on its face the check, and the release given [fol. 133] by Atlas, show that the payment of $35,000 was made to settle the Atlas claims, insofar as Southern was concerned, on both projects.

At the time when this payment was made by Southern to Atlas, Atlas had consolidated its accounts against Pickard, and was carrying them as one consolidated account. Atlas credited the $35,000 payment against this single account of Pickard, so that Pickard received full credit for this payment on his indebtedness to Atlas.

Neither Southern nor Atlas at the time of this payment specifically undertook to allocate the $35,000 payment to one project or the other. It was a single indivisible payment applicable to both projects. As stated, however, the payment was made to settle an account of $34,520 which was not disputed, arising out of the Fort Campbell contract, and another account arising out of the Fort Benning contracts which was disputed by Southern in its entirety.

Pickard gave no credit to Southern for this payment on either job, and his books do not reflect the payment. The record showed that Pickard had not been heard from by Southern since leaving the job in December, 1955, and there is no evidence that Pickard knew of the payment in August, 1956 at the time when it was made. In April, 1957, however, Pickard's attorneys were advised by the attorney for Southern that this payment had been made, and that the same had not been allocated by Southern either to Fort Campbell project or to Fort Benning.

As previously stated, in December, 1956 Pickard brought suit against Continental Casualty Company and Southern Construction Company in the United States District Court at Columbus, Georgia upon both the Fort Benning con-

tracts and the Fort Campbell contract. The suit, as originally filed, clearly embraced the contracts between the parties on both jobs. In response to this suit, Southern [fol. 134] filed an answer and counterclaim, in which it alleged that it had paid to Pickard sums in excess of the total contracts between the parties and Southern sought judgment for such excess. Included in the counterclaim at this time was the $35,000 payment hereinabove referred to.

In April, 1957, however, Pickard separated the Fort Campbell claim from the Fort Benning claim, and brought a separate action in this court on the former. Southern then filed an answer and counterclaim in this court, setting up the $35,000 payment as part of its defense and counterclaim in the Fort Campbell action.

In the trial of the Fort Benning case in March, 1959, Pickard introduced certain exhibits, which are also in the record in this cause, in which he purported to list all of the payments made by Southern to him or on his behalf at Fort Benning, and to give credit for the same. Pickard did not include the $35,000 payment made to Atlas in August, 1956, by Southern in the exhibit which he filed in the Fort Benning trial. Likewise Southern listed on exhibits filed in that case the payments made by it to Pickard or on his behalf on the Fort Benning jobs for which Southern claimed credit. The $35,000 payment made to Atlas in August, 1956, was not claimed by Southern in these exhibits in the Fort Benning case.

The record shows clearly that the $35,000 payment made by Southern to Atlas Supply Company in August, 1956, was not submitted to nor considered by the jury in the trial of the Fort Benning case. The court finds as a fact that this fund has not been litigated or adjudged by the United States District Court at Columbus, Georgia, and that credit for it was neither given by Pickard nor claimed by Southern in the previous proceedings between the parties in that court. Although the $35,000 was included in the original counterclaim filed by Southern in the Fort [fol. 135] Benning case, when all of the contracts were involved in that case, it was, prior to the trial at Columbus, dropped from Southern's counterclaim in that case. It has been included by Southern as part of its counterclaim and

defense in the present case, and Southern claims credit for $34,520 thereof toward the contract price of the Fort Campbell project.

C. Conclusions of Law.

In view of the conclusions hereinafter set forth the court is of the opinion that none of the findings of the jury, in response to the interrogatories put to them, need be disturbed by the court.

The first issue submitted to the jury was whether the defendant Southern so conducted its own operations as to interfere with the plaintiff Pickard in the performance of his work. The jury answered this question in the negative, and there is material evidence to support this finding. Indeed, the evidence is undisputed, that the work was pursued by Pickard to substantial completion, before his men withdrew from the job. Accordingly the court finds that the allegations of the amended complaint that Southern so interfered with Pickard as to justify him in abandoning his subcontract are not sustained by the proof, and that the finding of the jury in this regard is fully supported.

The second issue submitted to the jury was whether Southern failed to pay Pickard or the suppliers or material men of Pickard as it received payments from the government for work performed by Pickard. The jury answered this question "yes" and this finding of the jury amounts to a finding that there was a breach by Southern of the payment provisions of the supplemental agreement of October 7, 1955.

[fol. 136] The third issue submitted to the jury was whether, if either of the foregoing questions were answered in the affirmative, Pickard was induced to leave the work by the defendant's interference or by its failure to make payments. The jury answered this question in the affirmative, and in effect found that Pickard left the contract and gave up the work in December, 1955 because he had not received payments in accordance with the terms of the supplemental agreement of October 7, 1955.

Assuming, but not deciding, that there is evidence in the record from which the jury could have reached the foregoing conclusions, the court is of the opinion never-

theless that any breach by Southern which may have been found by the jury must have been material or substantial in order to justify rescission by Pickard, or to permit him to proceed in quantum meruit and treat the contracts between the parties as being rescinded. Accordingly, even though the jury has found a breach on the part of Southern and has found that Pickard left the job for this reason, if under the terms of the contracts between the parties the breach by Southern was not fundamental, Pickard would not be entitled to claim a rescission of the contract. Accordingly the Court is of the opinion that there is a legal question more fundamental than the questions submitted to the jury, which controls Pickard's right to claim rescission of the contract. This being so, the Court finds it unnecessary to disturb the jury's findings in regard to the second and third issues.

The legal question is whether, under the terms of the contract between the parties, and in view of the undisputed facts in the case, a failure on the part of Southern to make payments promptly under the terms of the October 7, 1955 agreement was such a material breach of contract as to justify rescission. The Court under the [fol. 137] authorities hereinafter set out and under the undisputed facts in the case, finds that the answer to this question must be in the negative, and that Pickard is not entitled to claim rescission or to abandon the contract.

It is well settled that under certain conditions a breach of contract by one party may warrant a rescission of the contract or an abandonment of it on the part of the other party. However, the rule is as stated in 12 Am. Jur., *Contracts*, Sec. 440:

> "A rescission is not warranted by a mere breach of contract not so substantial and fundamental as to defeat the object of the parties in making the agreement. Before partial failure of performance of one party will give the other the right of rescission, the act failed to be performed must go to the root of the contract or the failure to perform the contract must be in respect of matters which would render the performance of the remainder a thing different in substance from that which was contracted for."

Further, in the same section it is stated:

> "The right to claim a discharge of the whole contract depends, not on whether the act constituting the breach was inconsistent with the terms of the contract, but whether it was inconsistent with an intention to be further bound by its terms or whether the breach was such as to defeat the purpose of the contract."

As stated in the leading case of *Chamberlain v. Booth & McLeroy*, 135 Ga. 719, 70 S. E. 569:

> "Before partial performance of one party will excuse the other from performing his contract or give him a right of rescission, the act failed to be per- [fol. 138] formed must get to the root of the contract . . . Nor will its violation relieve the builders from damages unless their performance was prevented or made impossible by the act of the other party or by other cause recognized by the law as an excuse for non-performance."

See also *Knutson v. Metallic Slab Form Co.*, 128 F. 2d 408 (5th Cir. 1942).

The rule is well stated in the leading Tennessee case of *Brady v. Oliver*, 125 Tenn. 595, 147 S. W. 1135 (125 Tenn. at 614):

> "Before a party to the contract can assume the right to rescind for default of the other party, the default must be of such character as indicates an intent upon the part of the defaulter to abandon the contract."

Accordingly the court is of the opinion that in order for a breach of contract to warrant a rescission or to warrant the other party to abandon it, the breach must be so substantial that it goes to the very root of the contract and is of such character as to defeat the very purpose of the contract itself.

The court accordingly is presented with this question: Was the breach which the jury found to exist of that

character? Did it go to the root of the contract under the circumstances of this case, and was it so material that it defeated the very purpose of the contract between the parties?

In order to determine this question the background and circumstances leading up to the supplemental agreement of October 7, 1955 must be borne in mind. The original subcontract had been entered into in May, 1955, and it [Fol. 139] developed that Pickard was unable to supply a bond as required by the terms thereof. For this and other reasons the parties entered into the supplemental agreement. The court has found and again finds that this supplemental agreement related to both the Fort Benning and the Fort Campbell projects, and its terms are applicable to this case.

It must constantly be borne in mind, of course, that under the Miller Act, if a material man or supplier of Pickard was not paid for supplies furnished to the job, then such supplier would have an enforceable claim against the prime contractor, Southern, and its bonding company. It was therefore incumbent upon Southern to take steps to protect itself from double liability; in other words, to take precautions to see that all material men and suppliers of Pickard were paid and their accounts were satisfied.

With that purpose in mind the provisions of paragraph five of the supplemental agreement, hereinabove set out, were inserted into the contract. Southern was authorized to withhold all funds which had accrued until October 7, 1955 and thereafter Southern was to make payments, as funds were received from the Army, either to Pickard alone or jointly to Pickard and to his material men.

The clear purpose of these provisions was to protect the prime contractor with respect to the claims of Pickard's suppliers and material men. Under the plain provisions of the supplemental agreement, Southern was given an option, or choice, to make payments to Pickard directly or to make them jointly to him and his suppliers. This option rested with Southern, and the reason for its being vested in Southern was to give Southern the right to pay Pickard alone if satisfied that all of the bills of his

suppliers were paid. If evidence could be supplied to [fol. 140] Southern that this had been done, then Southern had a perfect right to make payments directly to Pickard. But to guard against the possibility that Pickard's suppliers were not paid, Southern was given the other choice, that is, to make payments jointly to Pickard and the suppliers. The unmistakable purpose of this provision was to give Southern the means of seeing that any payments which it made, even though Pickard was included as a payee, actually would go to pay the suppliers of Pickard.

Accordingly, under the terms of the contract, Pickard would have no right to receive any money from Southern unless and until he could furnish satisfactory evidence that he had paid all claims of his material men and suppliers. As long as there were outstanding bills, Pickard had no right to receive funds himself, or to have payments made other than jointly to himself and the unpaid suppliers. In other words, if there were outstanding bills, then Pickard had no right to receive any "free money" under the terms of this contract.

The undisputed facts in the case show that there was an outstanding bill of the Atlas Supply Company, the principal supplier of Pickard, of approximately $34,500 at all times after October 7, 1955. This bill was outstanding when Southern received payments from the Army as above set out. Therefore Pickard had no right to have the funds received by Southern paid to him personally. His only right was to have them applied to payment of the claims of his suppliers, consistently with the terms of the October 7 agreement.

If the contract had contemplated that Pickard was to receive direct payments as "free money" to him, it might very well be argued that the failure of Southern to make such payments to him as it received funds from the Army was such a material breach as would justify rescission by [fol. 141] Pickard. Under these circumstances the rule of *Guerini Stone Co. v. Carlin Construction Co.*, 248 U. S. 334, 63 L. Ed. 275, and similar cases might be applicable.

That is not the situation here. Under the terms of the supplemental agreement, Southern had the right to see that material men or suppliers of Pickard were paid in

order to relieve Southern of its own liability under the Miller Act. Accordingly, the *Guerini* case is not in point in this instance, and the failure of Southern to make payments to Atlas or other suppliers would be a material breach of contract only if it in some way interfered with Pickard or prevented him from carrying out the work required of him under the contract.

The undisputed facts in this case are that there was no such interference with Pickard. He was in no way prevented from carrying out the contract insofar as his suppliers and material men were concerned. There was no interference by reason of failure to pay a supplier. There is no proof that a single supplier or material man failed, refused or even delayed in furnishing any necessary materials for the completion of the required work.

On the contrary, the evidence is uncontradicted that all suppliers cooperated with Pickard and supplied him with what he needed to complete the project. Of course they knew that they had adequate protection against Southern under the Miller Act, since Southern was bonded on this job.

There is therefore no evidence in the record to support a conclusion that failure to pay Atlas or any other supplier in any way, form or manner interfered with Pickard in completing his contract.

Further, the evidence in the case clearly shows that Pickard carried the work almost to final completion. At [fol. 142] a minimum, it was 96% complete when he left the job without notice to anyone of an intention to rescind or to abandon the contract. Of course, there was no interference if there was substantial completion, nor can there be recovery in quantum meruit where performance has not been prevented. *United States of America for the Use and Benefit of Harkol* v. *American Construction Co.*, 168 F. Supp. 760 (D. Mass. 1958); *United States for Use of Gefen* v. *Conn*, D. South Carolina, August, 1959.

Accordingly, even though the jury has found that there was a breach of contract by Southern and that Pickard left the job because of it, as a matter of law the Court finds that such breach did not vest in Pickard, under the facts of this case, the right to rescind or abandon the contract.

Therefore Pickard is not entitled to recover in quantum meruit, and any recovery must be limited to the contract price.

Another question which has been briefed and argued, and which has been strenuously urged by the defendants, was whether Pickard had waived any right to claim rescission by reason of his long delay in giving any notice of a claim to such right, together with his having filed two suits upon the contract, rather than having promptly claimed rescission and having sued in quantum meruit.

It was also insisted by the defendants that in plaintiff's suit as originally filed in this Court, he sought enforcement of his subcontract and collection of the price specified therein, that the right to sue for the enforcement of the subcontract and collection of the contract price and the right to sue in quantum meruit for the work performed are inconsistent substantive rights, and that when he took steps to enforce the subcontract he made a conclusive election not to rescind on account of anything then known to him, and that thereafter he was not entitled to recover in quantum meruit.

[fol. 143] The Court, however, finds it unnecessary to decide these questions, since the Court has reached the conclusion that there was in the first place no such material breach of contract by Southern as would justify Pickard in rescinding.

Notwithstanding the fact that the plaintiff has sued, in his amended complaint, for quantum meruit alone, and apparently has abandoned his original claim for the contract price, the Court is of the opinion that if, under the facts of the case, Pickard is entitled to any recovery on the contract, such should be permitted. Accordingly the Court reaches the question of whether Southern has paid to Pickard or on his behalf the amount of the original contract price.

This brings the Court to consideration of the question of the $35,000 payment made by Southern to Atlas Supply Company in August, 1956. By Stipulation of the parties at the trial, this question was not submitted to the jury, but was reserved for decision by the Court.

It is the position of plaintiff that Southern was obligated to claim this payment as a credit in the Fort Ben-

ning proceedings, even though the plaintiff himself did not give credit for it in that case. Plaintiff claims that since Southern did not claim the credit in that proceeding, it has now lost the right to do so, and that its right to claim credit for this payment is barred by the rules of *res adjudicata*. Plaintiff relies primarily upon Rule 13 (a) of the Federal Rules of Civil Procedure, and insists that this payment was a compulsory counterclaim which Southern was obligated to assert in the Georgia proceedings.

Rule 13 (a) provides as follows:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader [fol. 144] has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced, the claim was the subject of another pending action."

Rule 13 (b) provides for permissive counterclaims as follows:

> "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

As heretofore stated, the Court has found as a fact that Southern did not claim credit for the $35,000 payment in the Georgia proceedings and that the same has never been adjudicated in any court. Southern has never received any credit for this amount.

There can be no question but that this payment by Southern pertained both to the Fort Benning and the Fort Campbell transactions, inasmuch as it constituted an overall settlement of Southern's liability to Atlas on both jobs. As previously stated, Pickard received full benefit of this payment by the reduction of his account to Atlas.

The Fort Campbell and the Fort Benning projects constituted distinct and separate transactions between the

same parties, Southern and Pickard; yet this payment of $35,000 unquestionably pertained to both. Thus it is a claim or payment which grows out of both transactions and is common to both. It therefore "arises out of" the transactions at both Fort Benning and Fort Campbell. It is very appropriately associated with both lawsuits, both [fol. 145] causes of action. The payment was unallocated by anyone. It was not applied specifically to either job at the time of payment. It was simply accepted and received as one indivisible, over-all payment, constituting a complete release of any liability of Southern to Atlas growing out of both jobs.

It can very well be said this is a situation where there are two transactions between the same parties, and a claim of one party against the other which grows out of both.

Had the plaintiff proceeded correctly at the outset in these cases, he would have filed separate suits in Georgia and in Tennessee at the same time on these respective projects. In fact, the plaintiff made a mistake and filed his claim for both projects in the court for the Middle District of Georgia. For jurisdictional reasons under the Miller Act, plaintiff later had to separate those two claims into separate lawsuits, leaving the Fort Benning job as the subject matter of the Georgia case and the Fort Campbell job as the subject of a new and independent suit in this court. So the two suits were subsequently separated by the plaintiff as they should have been at the beginning.

Therefore on its face there is a situation where Rule 13 (a), according to its express terms, applies to this $35,000 claim both in this court and in the Georgia court.

When the suit was first filed in Georgia, the defendant was required to assert this $35,000 claim there, and it did so. When the Campbell claim was later separated and made the subject of this separate suit, then Rule 13 (a) required Southern to plead the same claim in this court, because this claim also grew out of the Fort Campbell transaction. Being required to plead it in both cases, the defendant did so.

[fol. 146] Obviously only one court could adjudicate the claim, and in this particular case the claim was not adjudicated in Georgia nor submitted to the jury in that case

for determination. Had it been adjudicated there, it could not be litigated a second time here. But clearly, under the very terms of Rule 13 (a), this court has jurisdiction of the counterclaim because it grew out of the same transaction as the plaintiff's suit, and has not been adjudicated by any other court. Under Rule 13 (a) Southern was required to plead it here, and the court therefore has the right to adjudicate the validity of the claim and if it is valid, to give credit for it as a payment.

The subject is discussed in 3 Moore's Federal Practice, Sec. 13.14 (2). This section deals with the exception stated in Rule 13 (a), that a counterclaim is not compulsory if at the time the action was commenced the claim was the subject of another pending action. It might be argued that at the time the Tennessee suit was filed, this counterclaim was the subject of an action pending in Georgia. The Court has considered this question, since it might be argued that this was not a compulsory counterclaim in Tennessee. Even if this be true, however, the question arises as to whether it could be asserted in Tennessee as a permissive counterclaim, even though not compulsory.

The Court concludes that Southern could have pleaded this counterclaim in the Tennessee suit, even if it was the subject of another pending action so as not to be compulsory. In the section of Moore's Federal Practice above cited, the following is stated:

> "A claim which is the subject of a pending action need not be pleaded although it does arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. Thus assume P and A [fol. 147] are in an auto wreck and both seriously injured, and that A sues P for personal injury in a state court. Then subsequently P sues A for personal injuries in a federal court. Although A's claim for personal injuries arises out of the transaction or occurrence which is the subject matter of P's claim in the federal court, A need not plead such a claim, because his claim is the subject of an action already pending in another court. The next question is: May he do so? The policy underlying Rule 13 would permit him, if

he so desired, since the exception runs in A's favor and hence he should have the option to avail himself of it or not."

It therefore appears that the option is in favor of the party having the right of counterclaim, and if he sees fit to plead it, he may do so. It seems to the court that the above is an analogous situation to this case, and that even though this counterclaim was pending in Georgia and not required to be asserted in Tennessee, it could have appropriately been pleaded here, since it grows out of the same transaction as plaintiff's suit.

Accordingly, under the unusual facts of this case, the Court is of the opinion that even if the counterclaim was not compulsory in Tennessee, it was permissive in this suit and has appropriately been asserted here. Since it has not been adjudicated elsewhere, it can be set up in this case.

It would be a manifest injustice if the court should reach any other conclusion under the facts of this case. The record is undisputed that credit has never been given for this admittedly valid payment of $35,000. It surely would be unjust to reach a result which would preclude Southern from getting credit for this payment which was admittedly made and which almost paid in full the entire [fol. 148] job at Fort Campbell, after considering the previous payments which Southern had made. Such a result is not required under Rule 13 (a) when there are two actions pending in different federal courts with one counterclaim common to both transactions.

The result reached is equitable and in keeping with the Federal Rules. Obviously had the plaintiff filed his two suits separately and simultaneously as he should have done, there could not be any doubt that this would have been a compulsory counterclaim in both cases. Of course one court or the other would have had to adjudicate the matter while the other took appropriate action to stay its hand. Certainly, however, if one court has not adjudged it, the other federal court is not deprived of the right to do so.

Accordingly the court finds that defendant Southern is entitled to credit for this payment on the Fort Campbell

contract. This credit, together with the other payments admittedly made by Southern on the contract, makes a total in excess of the contract price expended by Southern. Since Southern has in open court waived any affirmative relief on its counterclaim, it results that plaintiff's suit will be dismissed at plaintiff's cost, and relief on the counterclaim of defendants will be denied. Judgment accordingly.

United States District Judge.

[fol. 149]

IN UNITED STATES DISTRICT COURT

For the Middle District of Tennessee,

Nashville Division.

Civil Action No. 2357.

THE UNITED STATES OF AMERICA for the Use and Benefit of SAMUEL J. PICKARD, d/b/a PICKARD ENGINEERING COMPANY,

vs.

SOUTHERN CONSTRUCTION COMPANY, INC., et al.

ORDER.

This cause came on to be heard before the Honorable William E. Miller, District Judge, upon motion of the defendants and appellees, to require the appellant to file a transcript of the testimony in this cause, and after hearing argument on the same it is Ordered, Adjudged and Decreed by the Court as follows:

1. The appellant, through counsel, has stipulated that no attack will be made on appeal on the findings of fact of the Court with reference to the question of whether the appellant is entitled to sue in quantum meruit. This stipulation is evidenced by the signatures of counsel below, and it is agreed that this order shall be forwarded to the Court of Appeals for the Sixth Circuit as part of the record in this cause on appeal.

2. The appellant is ordered to supply a complete transcript of the testimony of the witnesses, Senn, Baxter and Norman heard by the court without a jury, pertaining to the counterclaim of Southern Construction Company for [fol. 150] a payment of $35,000 to Atlas Supply Company, for which Southern Construction Company claimed credit in this cause, said transcript to be filed as part of the record on appeal in this cause.

3. Upon motion of the appellants, the costs in this cause are adjusted, and fixed as $344.44.

.....

District Judge.

GRACEY, BUCK, MADDIN & COWAN,
EDWARD GALLAGHER,
Attorneys for Appellants.

WILLIAM J. HARBISON,
ROBERT C. NORMAN,
HARRY S. McCOWEN,
Attorneys for Appellees.

EXCERPTS FROM THE TRANSCRIPT OF TESTIMONY OF MRS. SENN, OFFICE MANAGER, SOUTHERN CONSTRUCTION CO.

MRS. MARY SENN, called as a witness in behalf of the defendant, being first duly sworn, testified as follows in the absence of the jury:

Direct examination.

By Mr. Harbison:

Q. This is Mrs. Mary Senn. Is that correct?
A. That is correct.
Q. What is your position with Southern Construction Company?
[fol. 151] A. I am the office manager and bookkeeper. I supervise the——
Q. Speak louder please. You are the office manager and bookkeeper?

A. Yes.

Q. Mrs. Senn, you testified in the Fort Benning case. Is that correct?

A. That is correct.

Q. Did you prepare the exhibits which you and your company introduced in that trial?

A. Yes, I did.

Q. I hand you Exhibit GG, it is labeled as introduced in that trial, and ask you if that is a copy or is it the exhibit?

A. It is.

Q. From what did you make that up, Mrs. Senn?

A. From my books.

Q. From your books?

A. And records.

Q. There has been a statement that it was revised two or three times during the trial. Is that correct?

A. That is correct.

Q. Mrs. Senn, does it include the item of $35,000 paid by Southern to Atlas in August, 1956?

A. It does not.

Q. Did it ever in any of its forms contain that item?

A. No, it did not.

The Court: This paper is what? An exhibit down there?

Mr. Harbison: This was an exhibit down there.

By Mr. Harbison:

Q. Mrs. Senn, what was the purpose of this exhibit, if you know, and its nature?

A. It was to—to show the amounts which we paid out for Mr. Pickard, either to him or for him.

[fol. 152] Q. On which job?

A. On the Fort Benning job.

Q. On the Fort Benning job?

By the Court:

Q. When was that exhibit prepared?

A. Well, this particular one was revised at the trial. The—We—Ah, I prepared the original ones on Fort Benning and Fort Campbell about the same time.

By Mr. Harbison:

Q. And about when was that when you prepared the original exhibits for the two different lawsuits, Mrs. Senn?

A. Oh, I don't know the exact date. It would have been some time last year.

Q. Let me ask you when you first ever met me?

A. Was it the latter part of 1958? November or December, I believe.

Q. The latter part of 1958; yes, ma'am.

A. And—And I had those schedules, I believe, at that time, both of them.

Q. And had you prepared a schedule to be introduced in the lawsuit here in Nashville at that time on the Fort Campbell contract?

A. Yes, sir.

Mr. Harbison: (To counsel) Do we have copies of this to give to them?

It is going to be introduced later in the evidence, but I offer it now to show one thing only with reference to this res adjudicata business.

The Court: What is it?

By Mr. Harbison:

Q. Mrs. Senn, is this the exhibit that you prepared and had prepared for us to use in our proof in the present case here in Nashville?

A. That is correct . . .

[fol. 153] By Mr. Harbison:

Q. Let me preface the question with some other questions. Mrs. Senn, in keeping your books on these two jobs that were going at the same time, Fort Campbell and Fort Benning, was each job assigned a job cost number?

A. Yes, sir.

Q. And were checks on the two jobs normally given one job cost number or the other?

A. Yes, sir.

Q. Was this $35,000 check at the time it was paid, Mrs. Senn, given either job cost number?

A. No, sir.

Q. This check at the time of its payment was not given either job cost number?

A. It was not.

Q. It was at that time unallocated between the jobs?

A. That is correct.

Q. When, if ever, did it become material to you to allocate it?

A. When they separated these suits.

Q. When they separated the two lawsuits?

A. Yes, sir.

Q. And that had been done at the time you conferred with me last year?

A. Yes, sir.

Q. Mr. Grant: Your Honor, we object to that. We submit that their books and records show the allocation if there was any, that after litigation is commenced, they can't reallocate a payment that was made several years before then.

The Court: You say they cannot do it?

Mr. Grant: That is correct, Your Honor.

The Court: They can be for some purposes and not for other purposes. I think we ought to hear the facts, as to just what they did in making an allocation.

[fol. 154] Mr. Harbison: All right. The check and the release are here already in evidence before Your Honor. It will be necessary that they be referred to by the Court, I think, in deciding the case. I will not re-offer them, of course. They are already Exhibit 22 in this case.

The Court: I would like to know what steps she took to make the allocation that she says was made and why it was done, on what basis it was done, and so forth.

Mr. Harbison: All right, sir.

By Mr. Harbison:

Q. Mrs. Senn, you testified that at the time the $35,000 was paid, no allocation particularly was made to either job, no allocation. Is that right?

A. That is correct.

Q. It showed on your books as an unallocated cost. Is that correct?

A. That is correct.

Q. Does it still show that way?

A. It still shows that way.

Q. It still shows that way. You have never on your books applied it to either one?

A. No, because those jobs would have been closed out in 1956, and we don't reopen a job that is complete because our books are set up on a completed contract basis.

Q. All right. And it was not on the books themselves ever given a job cost number or allocated?

A. No, sir.

Q. Now, the $100,000 payment that had been paid to Atlas back in December, we have here the cancelled check and a copy of the voucher relating to that check. Would you just read the legend on the voucher there, Mrs. Senn? (Handed document to witness.)

A. (Reading) "Payment on account Atlas Supply Company for materials delivered to Fort Campbell and Fort Benning Jobs. Entire sum to be applied against payment [fol. 155] of material furnished by Atlas. Previous payments directed for material furnished by Atlas on the Fort Benning and Fort Campbell Jobs. Fort Benning, $195,277.41; Fort Campbell, $13,000; $100,000, Fort Campbell and Fort Benning. Totals directed for payment per above."

Q. In other words, that last $100,000 refers to the amount being paid with this check. Is that right?

A. That is correct.

Q. All right. And the voucher itself showed that it would be applied to both jobs. Is that right? I mean it was for payment of materials on both jobs?

A. That is the typing on the voucher.

Q. That's the typing on the voucher?

A. Yes, sir.

Q. But, actually, bookkeeping-wise, it was all charged to the Fort Benning job. Is that right?

A. Yes, sir. It has that job number on the voucher.

Q. It has that job number on the voucher. And you were given credit for it by the plaintiff in the Fort Benning case. Is that correct?

A. That is correct.

Q. And claimed credit for it in the Fort Benning case?

A. That is correct.

Q. And made no attempt to allocate any part of this $100,000 to Fort Campbell, did you?

A. I did not.

Q. You did not although——

The Court: What does that mean on there, "Fort Campbell" so much money?

Mr. Harbison: Sir?

The Court: What does that mean there by "Fort Campbell" so much money? What is the purpose of that?

By Mr. Harbison:

Q. What is the purpose of these, Mrs. Senn? Your reference to Fort Campbell, $13,000, had reference to what? [fol. 156] A. I believe that refers to the previous checks that were made jointly to Atlas and to Pickard.

Q. Then that was the $13,000 introduced here already?

A. Yes.

Q. Of course, you were not in on the actual negotiations between Atlas and Southern and Pickard, Mrs. Senn?

A. Not any of it.

Q. You were just the bookkeeper?

A. That is correct.

Q. Were you ever specifically directed at the time of the payment to charge the $35,000 to either job by your employers?

A. I was not.

Q. You were not. All right. No specific instructions were given you by Atlas about that, were there?

A. No, sir.

Q. Nor by your own employers?

A. No, sir.

Q. All right. And in preparing the exhibit in the Fort Benning lawsuit, you did not claim the credit for the $35,000 in that case? Is that correct?

A. I did not.

Q. In preparing the exhibits to be used here, from the beginning you have allocated it here?

A. I have.

Mr. Gallagher: Your Honor, I don't believe that whether or not——

The Court: How is that?

Mr. Gallagher: I don't believe that whether or not in preparing exhibits to be used here she included the $35,000 is relevant.

The Court: Yes, I will hear that——

Q. Just state to the Court what the Atlas Supply Company was billing your company for as of December 31, 1955, please, ma'am, on the Fort Campbell job?

[fol. 157] A. The statements were made to Pickard Engineering Company and Southern Construction Company, and the amount is $34,520.94.

Q. $34,520.94?

A. Yes, sir.

Q. Previously, they had given you credit on those invoices or statements for the $13,000 payment that you had made in August. Is that correct?

A. That is correct....

The Court: It is a very important thing. It is an unusual situation the way it was handled. There is no question about that due to this complex relationship between the parties, I suppose, primarily, and the fact that it was immaterial in the beginning to allocate it. That led to the original way of treating it, not allocating it to one or the other.

This Court is interested in doing what is equitable between the parties and what is just and fair. Of course, if I am bound by a technical rule of law, then I am bound, and there is no way I can get out of it; but if I have any discretion, then I am going to do what I think is equitable and what I think is fair. If, in fact, the people who paid this $35,000 have never gotten any benefit from it whatsoever and have gotten no credit for it, that is going to be a strong consideration in my mind in trying to reach a proper solution of this controversy.

If you can convince me that this matter was presented to the jury down there and the jury gave them credit for it or was in position to give them credit for it—Of course, we cannot know for certain what the jury did, but if the matter was shaped up in such way, if the issues were in such shape that the jury might reasonably have given you

credit for it, then that is another consideration to take into account.

Q. Did Pickard ever make any change in its books of any kind, any entry of any sort whatsoever in any book [fol. 158] regardless of the description of it by reason of this payment having been made to Atlas?

A. Not as I can see in their books, I don't think.

Q. All right.

A. There was no entry after January.

Mr. Grant: Your Honor said, "Pickard." I believe you meant Southern.

The Court: No. I meant Pickard.

Mr. Grant: Oh, you mean from her examination of Pickard's books?

The Court: Yes.

Mr. Grant: All right, sir....

Redirect examination.

By Mr. Norman:

Q. Mrs. Senn, the plaintiffs have introduced Plaintiff's Exhibit No. 33, and have questioned you about an affidavit in here dated August 22, 1958. They have asked you about—Plaintiff's Exhibit No. 17, which is your affidavit, dated August 5, 1958. Now, I show you your affidavit filed in that same motion for summary judgment, dated August 22, 1958, and ask you if that is your signature? (Handed document to witness.)

A. That is.

Q. Now, I will ask you if there is not a Schedule One attached to that affidavit setting forth the exact amount which Southern claimed in the motion for summary judgment?

A. Yes, sir.

Q. And I will ask you to look at Schedule One attached to the Plaintiff's own affidavit which they have submitted here in evidence, and see if there is a column entitled, "Pickard and Atlas"?

A. There is.

Q. Did you prepare that schedule?

[fol. 159] A. Yes, I did.

Q. And would you give for the record the dates and amounts paid to Pickard and Atlas in that column?

A. July 5th, $45,277.47; July 28th, Check 2086, $100,000; August 30th, '55, Check No. 2276, $50,000; December 16th, 1955, Check No. 3245, $100,000.

Q. And what do those total?

A. They total $295,277.47.

Q. Is there any item in there claimed for $35,000 for Atlas Finance Company?

A. No, sir.

Q. Was that the total amount on which your affidavit was based at that time?

A. Yes, sir.

Mr. Norman: If Your Honor please, we submit in evidence in behalf of the defendant—this is already in evidence in behalf of the plaintiff, and they have discussed this first affidavit. This is a supplemental affidavit filed after the hearing before the Court in which we segregated the two suits and segregated the affidavits, and that affidavit affirmatively shows the amount that we claimed for Atlas, that we paid Atlas, the amount that was claimed in the suit.

The Court: You are offering this as an exhibit? You offer that, this whole document?

Mr. Norman: It has already been offered in evidence. We offer the affidavit and schedules attached of Mary L. Senn, dated August 22, 1958, which are likewise included therein.

The Court: This is already in evidence, you understand.

Mr. Norman: Yes, sir.

The Court: You are just calling attention to it?

Mr. Norman: Yes, sir.

The Court: What about this affidavit in August of 1958, August 5, 1958? Is that before the suit was separated?

[fol. 160] Mr. Norman: If Your Honor please, it evidently was the affidavit which we prepared before going down to the arguments before the Court on the motion for summary judgment. At that time, at the time of the arguments before the Court on the motion for summary judgment, as I recall

it (and Mr. Gallagher can correct me if I am wrong), he stated to the Court down there at that time that the suit was pending at Fort Campbell and that he had a separate suit and that he intended to amend and leave out the Fort Campbell claim.

We, therefore, stated to the Court that we agreed to that and that we made our motion for summary judgment on the basis only of the Fort Benning claim.

The Court, at that time, after arguments granted our motion for summary judgment and suggested to us the propriety of filing an additional motion for summary judgment on our counterclaim. It was with that thought in mind that we prepared and filed the additional affidavit of August 22, 1958, which I have just pointed out to the Court and called to the Court's attention.

So that when we filed our additional affidavits on the counterclaim in August of '58, it affirmatively shows by that record there that we were not claiming anything as to Fort Campbell in that suit and that on that motion for summary judgment we were only claiming the amount of $295,000.

The Court: I understand that, but in this prior motion supported by this particular affidavit, you were claiming this $35,000?

Mr. Norman: In that prior affidavit before we had the pleadings conform to the fact that there were separate suits, they were all together.

The Court: All right.

Mr. Gallagher: Your Honor, I think it should be stated that even though the Georgia complaint was not physically [fol. 161] amended by striking out the Fort Campbell contract paragraph until some time around this time, the suit had been filed in April of 1957, so that the cases had been separated for more than a year before that affidavit.

The Court: They had been separated by the filing of this separate suit?

Mr. Gallagher: Yes, sir. That is correct, and the formality of striking out the paragraph in the Georgia case was not met until we had an opportunity to do it with the Court.

The Court: Yes. All right.

Mr. Norman: That is correct, Your Honor, and the motion was proceeding on the basis that it was not included at this time.

The Court: Is that all of the witness?

By Mr. Norman:

Q. Mrs. Senn, was the check for $35,000 in payment of this account of Atlas ever exhibited at the trial at Fort Benning?

A. No, sir.

Q. Was it ever introduced in evidence?

A. No, sir.

EXCERPTS FROM TESTIMONY OF RICHARD J. BAXTER, SECRETARY, SOUTHERN CONSTRUCTION COMPANY.

By Mr. Harbison:

Q. All right, sir. My question was: Just state in your own words how you arrived at and agreed to pay the $35,000 to the Atlas Supply Company in full settlement of both accounts?

A. We had an affidavit from Pickard and we had an affidavit from Atlas Supply Company that thirty-four thousand five hundred-odd dollars was due and payable to [fol. 162] Atlas at Fort Campbell. We didn't dispute that. To our own knowledge we were aware that there was a substantial and visible amount of material there furnished by Atlas. We did dispute the Fort Benning account completely.

Q. You disputed it in its entirety?

A. In its entirety; yes, sir.

Q. They were claiming $104,000-odd, Mr. Baxter, is that correct?

A. We still disputed it completely.

Q. And why, without going into great detail?

A. They had not given us credit for various joint checks in the amount of fifty-odd thousand dollars that we had made payable to Pickard and Atlas.

Q. Had any other mistakes been discovered in that invoicing?

A. There were various invoices that were sent to us and included among our bills that were for McDill Air Force Base, a job that we had, that we were not even on, that Pickard was a subcontractor on for another general contractor.

Q. Mr. Baxter, had you or not previously made payments to Atlas on that Fort Benning account?

A. I had; yes, sir.

Q. Do you know about how much that totaled?

A. A sizable amount of money. I don't remember offhand.

Q. A very large amount of money?

A. Yes. It was two or three hundred thousand dollars to the best of my recollection.

Q. All right. Did you or not dispute the Fort Campbell invoicing or billing?

A. No. We did not.

Q. Did you or not dispute the Fort Benning billing?

A. We did.

Q. In part or in its entirety?

[fol. 163] A. In its entirety.

Q. Did you make this offer of $35,000?

A. I did.

Q. And you, of course, paid it, and have the release here before the Court. Is that correct?

A. Yes, sir. That's correct.

Q. Mr. Baxter, were you present at the trial in Fort Benning?

A. I was. Yes, sir.

Q. Was this $35,000 check ever offered in evidence?

A. No, sir.

Q. In your exhibits listed down there showing the payments for which you claimed credit, was it listed on those exhibits?

A. No, sir.

Q. In the exhibits filed by them showing the payments for which they gave you credit, was it listed?

A. No, sir.

Q. All right, sir. . . .

By Mr. Harbison:

Q. Now, Mr. Baxter——

Mr. Harbison: Your Honor, I think this has already been pointed out to the Court, the payments listed on here, and I will not repeat that other than to ask this witness:

Q. Did the $35,000 payment appear on your exhibits down there?

A. No, sir.

The Court: On that exhibit?

By Mr. Harbison:

On this exhibit? Excuse me,

A. No, sir, it did not.

Q. To your knowledge, did it appear on any other exhibit in that record?

A. No, sir.

Q. Mr. Baxter, did you or not testify (as I read from the record the other day) that you were not charging $35,000 into that job?

[fol. 164] A. I so stated.

Q. So stated from the witness stand?

A. From the witness stand. Yes, sir.

Q. All right, sir.

A. To Mr. Grant...

Mr. Harbison: There has already been exhibited in this record in this case Defendant's Exhibit No. 3 which is a letter from Mr. Robert H. Winn, certified to by Mr. Pickard, and signed by Mr. Pickard.

The Court: What is the date of that letter?

Mr. Harbison: It is dated December 6, 1955. It states the amounts delivered to both jobs by the Atlas Supply Company, and Mr. Pickard identified it on his cross-examination.

The Court: Let me see that.

Mr. Harbison: Yes, sir.

(Document passed to the Court.)

The Court: All right.

By Mr. Harbison:

Q. Mr. Baxter, although Mr. Pickard had certified the bill, state whether or not you agreed with the accounting at Fort Benning?

A. No, I didn't agree with the accounting at Fort Benning.

Q. Did you or not dispute the accounting at Fort Campbell?

A. No, I didn't dispute the Fort Campbell accounting. I did dispute the Fort Benning accounting.

Q. All right, sir. Mr. Baxter, at what point of time was any decision made about allocating this payment to the Fort Campbell job as best you can recall?

A. When we found we had two suits. Originally, there was one suit. . . .

By Mr. Harbison:

Q. Now, Mr. Baxter, you say that Mr. Norman made the decision to claim the $34,500 up here. Is that your testimony?

[fol. 165] A. That's right. Yes, sir.

Q. Can you tell us—Were you advised of it or was it in conference with him that you made it or not?

A. Certainly it was in conference with—with Mr. Norman.

Q. Do you know about when or can you fix the time when such decision was reached?

A. Shortly after the time we found—I can't place the exact date. I don't recall when the suits were split, but when the suits were split from one into two, it was approximately that time.

Mr. Grant: I can't quite hear the witness. Will you speak a little louder?

The Witness: Shall I repeat that?

By Mr. Harbison:

Q. Can you repeat it, Mr. Baxter?

A. It was some time shortly after we found we had two suits, one in Tennessee and one in Georgia, rather than the one that had been filed by you all in Georgia.

Q. Let me ask you had it been made by the time of the trial of the case in Georgia in March of this year?

A. Well before that time, yes.

Q. Well before that time?

A. Well before that; yes, sir.

The Court: The Georgia case was tried in March of 1959?

Mr. Harbison: In March of 1959.

I believe that is all that we have at this time.

By the Court:

Q. Was there an actual decision made not to claim it in the Georgia suit? Do you know of any such decision?

A. Well, Bob Norman would have made any decision.

Q. I know he would have, but do you know whether or not there was a decision made?

[fol. 166] A. Yes; yes, sir.

Q. Who made the decision?

A. Mr. Norman.

Q. Did he tell you he was making a decision?

A. Yes, sir.

Q. Did you discuss it with him?

A. Yes, sir; I did.

Q. And what was the decision?

A. The—The decision, please, sir, relative to allocating the money?

Q. Relative to claiming the $35,000 payment which was made to Atlas in the counterclaim down there in the Georgia suit or up here in the Tennessee suit?

A. Mr. Norman realized that I had no dispute on the amount owed up here. I advised him of that, and advised him that the amount of 34,500-and-some dollars was not a disputed amount up here; and he was also aware, due to the difficulty we had had, that I completely disputed the Benning account, and the proper allocation of it, I suppose was the reason he did as he did.

Q. What did he do?

A. He allocated $35,000 up here.

Q. How do you know that he did?

A. Our records and the way my bookkeeper's transactions have resulted——

Q. Do you have any bookkeeping entry that shows that?

A. Well, this Exhibit GG that we submitted at Benning didn't include any $35,000.

Q. Is that the record you are speaking of?

A. That. Then—Your Honor, to the best of my memory, since we have had two suits, there have been two separate breakdowns of the cost.

Q. I just want to know the record you are speaking of when you say there was a definite inclusion of it in the Tennessee case and not in the Georgia case. I want to [fol. 167] know the record that shows that, that demonstrates that. You said there was a record, and you pointed out this exhibit that has been introduced in evidence here.

A. If the Court please, as far as the bookkeeping record, Your Honor, I can't recall that particular phase of it; but I do know that I—I made a statement at Benning that "We aren't—We aren't asking—This doesn't include the $35,000." That's a different matter. We have never attempted to claim $35,000 credit on the Benning item down there. We have never presented it there. Ever since we have had two suits, the Pickard situation and material costs have been allocated to Fort Campbell.

Q. Mentally allocated in your own mind or by records?

A. No. The preparation of the——

Q. That is the exhibit you referred to a moment ago.

A. That's one. And then the preparation of the various documents that we submitted that I would be given an opportunity to read and things of that sort.

Q. Then this decision, as I understand your testimony as far as you are concerned, was a decision made by your attorney representing you?

A. That's correct, sir.

Q. In the course of the litigation after the divison was made in the two suits?

A. That's correct. Yes, sir.

Mr. Grant: Your Honor, where the point of their motion was, that Pickard had left unjustifiably and that they had spent these great amounts of money in completing this contract including this $35,000 and that, therefore, as a matter of law he could not recover on his plaintiff's suit, that a motion for summary judgment in favor of

the defendant as to that should be granted because they had spent these sums far in excess.

The Court: And they were claiming $35,000 as a part of that?

[fol. 168] Mr. Grant: Yes, sir. That affidavit there was submitted in connection with that defense, Your Honor.

Mr. Norman: We say that that is not true, if Your Honor please. The mere fact that it was included in our affidavit does not show that it was claimed.

Mr. Gallagher: It is merely a statement of settlement.

The Court: What was the point in stating that this $104,000 had been wiped out by settlement?

Mr. Norman: The reason for stating that, if Your Honor please, that paragraph dealing with the Atlas account—The reason for stating that in the affidavit at that time, which I drew, was to show that the account was disputed, the reason it had not been paid earlier, to show that the reason why we had not paid it, but to go on and say that in spite of that Atlas did not fail to furnish materials at any time to the job. We were seeking to show the reason for the failure to pay Atlas on time was that the account was disputed, and that this was the amount of the dispute. And we were simply seeking to present that fact to the Court down there, that the Atlas account at Fort Benning was in dispute, and we were bringing out the settlement to show subsequent acts by the parties to prove that it was a bona fide dispute. We were showing by the fact that they settled for less than the full amount, that they settled for $35,000——

The Court: Justified your not paying.

Mr. Norman: Justified our not paying them down there, and that the account was in dispute and that we were correct in not paying them. . . .

Mr. Norman: Originally, as Your Honor points out, this counterclaim included all four contracts, both at Fort Benning and Fort Campbell.

The Court: It uses the overall aggregate figure there of six hundred and some odd thousand dollars.

Mr. Norman: That is correct.

[fol. 169] The Court: And that includes the $35,000?

Mr. Norman: That is correct. Now, when these figures were changed to 580 and 508, as Your Honor read them

out, that was pursuant—That was eliminating Fort Campbell from the motion for summary judgment at Fort Benning. The affidavit which they have just referred to and which I have sought to make a correction on, the affidavit which Mr. Grant just read in toto covered figures totaling $580,000 on a $508,000 contract. The affidavit which he read in toto a few moments ago does not include the amounts for Fort Campbell at all.

The Court: All right. Let me see that.

(Document passed to the Court.)

The Court: Whose affidavit is this?

Mr. Norman: This is the one of Mrs. Senn that he is making such a to-do over.

The Court: Let me have the motion back on the counterclaim.

Mr. Norman: He said when he read it that it included the Fort Campbell money. It does not, Your Honor. It includes only the 508.

The Court: These corrections were made then before this affidavit was prepared. Is that what you are saying?

Mr. Norman: I do not know when those corrections were made. I believe they were made at the time of the hearing down there probably by the Judge as we argued the thing. I do not know exactly when those penciled corrections were made, but I do say this, Your Honor, that when we filed these affidavits, this affidavit here which he has read in toto, and when we filed our affidavits on the counterclaim and that formed the actual issue to be heard by the judge, that it was only for the amount of the three Fort Benning jobs and did not include the Fort Campbell job.

[fol. 170] The Court: That came later though. What I am trying to do is to find out the status of the matter as of the time this original counterclaim was filed and the Senn affidavit together.

Mr. Norman: May I ask the Court what is the date of the original motion as compared to the affidavit?

The Court: January 31, 1957, was the filing date.

Mr. Norman: And; you see, the affidavit was dated in August of 1958.

The Court: The fifth day of August, 1958?

Mr. Norman: Yes, sir. Now, what I say, Your Honor, is that in-between those two dates——

The Court: These corrections were made?

Mr. Norman: These corrections were made, and we had the hearing before the judge on an agreement that Fort Campbell was not to be included. . . .

Mr. Norman: If Your Honor please, may I further illustrate that that $50,000 contract at Fort Campbell is not included in those figures before Your Honor because I think that is germane. I think that is very important to show that Mr. Grant (and I do not think he intended to mislead the Court) was in error when he said that this affidavit included all of the materials at both Fort Campbell and Fort Benning. If Your Honor will look at this figure——

First of all, may I ask the Court to again refer to the page where those corrections were made and see if that difference is actually $50,000 if you took the printed figures as compared to the—Excuse me, Your Honor. The difference between 638 and 580 should be approximately $50,000.

The Court: $48,000.

Mr. Norman: I think that shows that that was an elimination of the Fort Campbell contract by those changes of figures. To further substantiate that, I call Your Honor's [fol. 171] attention to this: This was attached to Mrs. Senn's affidavit, the second affidavit after this one that you have just read.

The Court: Yes. I understand that. It was eliminated in that second one.

Mr. Norman: And this affidavit shows the amount of the three contracts at Fort Benning, and there they are: $511,931.56, and there it is $508,511. So this could not include the $50,000 Fort Campbell contract.

Now, I further show the Court Defendant's Exhibit GG at the trial which shows that the figures were substantially the same as in this affidavit all the way through Mrs. Senn's first affidavit, the second affidavit, and Exhibit GG at the trial. His Honor will note that the contract price is approximately 511, so that in all three of these Fort Campbell was eliminated. And we contend that the mere

fact that the language that was in this affidavit was there for the purpose of showing that it was a disputed account, bona fide. . . .

Cross examination.

By Mr. Grant:

Q. And I want to direct your attention to the statement on page 4 of that affidavit. After having detailed the amount of $139,492.06 for materials furnished at both Fort Campbell, Kentucky, and Fort Benning, Georgia, over and above the payment of $100,000 made on December 16, 1955, you say: (Reading)

"Southern contested the correctness of this amount as the balance due and owing for materials furnished, and subsequent to default by Pickard, on January 17, 1956, paid Atlas the sum of $35,000 in full satisfaction of a total claim invoiced by Atlas in the amount of $139,492.06."

That figure was the total at both places, wasn't it?

[fol. 172] A. Yes, but I paid them $35,000 because I knew that I owed them $35,000 approximately at Fort Campbell. I didn't—I still say that I contested it. I said it here, and I still say that I did.

Q. All right. The next paragraph deals with that, and I want to direct your attention to it.

A. All right.

Q. (Reading) "Deponent further says that it was not until the December 16 meeting that Atlas finally gave full credit to Southern for all previous payments made to Atlas and Pickard jointly by Southern."

A. Shall I answer that?

Q. Yes, sir.

A. At the meeting, they verbally conceded that they would give us credit, but they failed to give us the credit.

Q. All right, sir. All you were asking for was certain credits, and they agreed at the meeting that they would give them to you?

A. They didn't however.

EXCERPTS FROM TESTIMONY OF ROBERT C. NORMAN, ATTORNEY FOR SOUTHERN CONSTRUCTION CO.

By Mr. Harbison:

Q. Now, Mr. Norman, was your firm engaged to defend the first suit that was brought?

A. Yes.

Q. Did that suit embrace both Fort Campbell and Fort Benning contracts?

A. Yes, it did.

Q. In preparing for the defense of that case, did you discover whether or not there had been any allocation of this $35,000 between the two different jobs?

A. The question of the allocation of this $35,000 did not present itself particularly at that time. All four jobs [fol. 173] were together, and we were simply seeking to ascertain what our total costs had been in completing the four jobs.

Q. When, if ever—First, did it ever become material to make any allocation?

A. After the plaintiff filed his suit up here at Fort Campbell.

Q. The suit in this court at Nashville, Tennessee?

A. Yes.

Q. After that was done, Mr. Norman, did you or not undertake to advise with the client concerning some direction or allocation of this money?

A. Yes, I did.

Q. Mr. Norman, I may have forgotten my question now, but may I summarize? Did you say that it was after the suits were separated that it first became material to try to make any claim of allocation?

A. That's correct.

Q. All right. Now, then, I ask you, if you will, just tell us what was done in that regard?

A. The suit was filed at Fort Campbell, I believe, on April 4, 1957; and it became necessary for us to file defensive pleadings in that suit.

In July of 1957, I suffered a slight heart attack, and was out of action for several months, and most of my

courtroom work was put off for an indefinite period of time; and this case—both cases, the Fort Campbell case and the Fort Benning case, were in a state of suspense for something like a year. So it was the summer of 1958 when the cases again became active. I cannot tell you at this time whether it was before my illness in July of '57 or after I returned to the office when I had to prepare or began preparation of the defense in both cases.

Sometime between April of 1957 and August of 1958, I looked into the preparation of the cases for triad, and [fol. 174] began to work and look into the various charges, accounts, and so forth. I looked over the invoices of materials furnished. I conferred with Mrs. Senn and I conferred with Mr. Baxter. I had to decide how we should defend the suit at Fort Campbell and how we should defend the suit at Fort Benning.

The earlier pleadings had included at Fort Benning all four jobs because that was the way it was originally filed. All four jobs were included in the original suit, and then the plaintiff chose to amend or file a new suit up here.

At the time that I considered this matter, I realized that we had invoices totalling some $47,000 for work at Fort Campbell. We had received credit for $13,000 approximately, which left $34,500 and something. In discussing it with Mr. Baxter, he informed me that, and verified the fact, as I had recalled it, too, that we had not argued about the amount of the payment here.

I was concerned that there might be some argument on the—Since we had disputed the account at Fort Benning, I was concerned that there might be some argument as to claiming this amount down there for materials actually furnished because we had contended that they had not been furnished, and we had further contended that the bill was in error and was in dispute.

I came to the conclusion as a matter of law, having taken the place of the debtor, that we had a right to claim this amount up here, the $35,000 payment. I therefore, instructed Mrs. Senn at that time to prepare two different schedules. One was the schedule which later developed into Exhibit GG in the case down at Fort Benning. It included only the three jobs which were actually performed

there, and it did not include this item of $35,000 or $34,500. All of the items in that schedule, including Pickard and Atlas account, showed up, and the checks were introduced as vouchers to support this schedule GG.

[fol. 175] At that same time, Mrs. Senn prepared, at my direction, a similar cost schedule for Fort Campbell in which we claimed this item of $34,520.94. And it was at my direction that that was done.

Q. And you cannot give us the exact date on which that was done?

A. I cannot give you the exact date on which it was done, but it was done prior to our filing our affidavits in support of our motion for summary judgment in the—in the Fort Benning case because all of those affidavits of Mr. Baxter and Mrs. Senn and the others deal only with the three contracts at Fort Benning.

Q. Therefore, it necessarily had been done before I came down last fall?

A. Yes. It was done before you came down last fall.

Q. Mr. Norman, the case in Tennessee was actually set for trial first, was it not?

A. That is correct. I believe it was, and then it was continued.

Q. And that was because of your own physical condition?

A. That's correct....

Cross examination.

By Mr. Grant:

Q. You did realize then, and you do now, that the payment involved both jobs, Fort Campbell and Fort Benning?

A. The payment was in satisfaction of a larger amount, yes.

Q. Yes, sir.

A. But the payment was made primarily because of the indebtedness owed at Fort Campbell....

Q. All right, sir.... You wrote this letter in April, 1957, which is in evidence, a copy of which is attached to the motion for summary judgment on the counterclaim, did you not?

[fol. 176] A. Yes, sir.

Q. And that was written on April 15, 1957, which is some eleven days after the suit was filed in this court?

A. Do you have the date when service was perfected in this suit? Do you know that?

Q. I don't offhand.

A. I don't either. I was just wondering whether you did.

Q. You were acquainted with the pendency of the suit at the time you wrote this letter?

A. No, sir. I did not know anything about the Fort Campbell suit at the time I wrote this letter.

Q. But you did at that time make the statement, "Included in the Fort Benning invoices." And I want to call particular attention to that now. You were furnishing certain information as to Benning and as to Campbell to Mr. Pickard's attorney at his request?

A. That's right.

Q. And you said: "Included in the Fort Benning invoices"——

A. (Interrupting) All right, sir. Let me talk about that a minute.

Q. (Continuing) ——"is our Voucher No. 9715 dated August 27, 1956, payable to Atlas Supply Company in the amount of $35,000 in full satisfaction for all materials delivered to both Fort Benning and Fort Campbell jobs. This was an overall lump-sum settlement, and we are unable to allocate this amount as between Fort Campbell and Fort Benning."

A. That's correct, sir. At that time, I knew nothing about any other lawsuit other than the one for all four jobs which Mr. Gallagher had filed down at Fort Benning. We were seeking to cooperate with him and furnish him information, detailed information as to all of the payments which had been made for Mr. Pickard's account after he left the job; and earlier in the letter, we had said that [fol. 177] we were sending him certain files in folders, enclosed as folder marked, "Number 1." And there were other folders, Folder No. 2. And whoever the girl was who got up all the copies of the invoices out there at Southern's office and did all this work to furnish it to Mr. Gallagher, put in the file or the folder with the Fort Benning invoices simply this Voucher No. 9715, payable to

Atlas Supply Company. We simply—I simply tried to locate in my letter—I said, "Included in the Fort Benning invoices." I was designating the folder in which that was included. It was no significance other than the fact that I was trying to tell him where to find it in all the papers I was sending him.

Q. All right, sir.

A. That's the reason I said that, and at that time the suit up here at Fort Campbell, which Mr. Gallagher chose to file in order to separate these causes of action, I had no knowledge of. . . .

By Mr. Grant:

A. I would like to say this in reference to your last statement, Mr. Grant, that I think it is clear (at least, it is to me) when I prepared this, that the purpose for which I was including this language was to show that there had been a dispute between Southern and Atlas as to the correctness of the bill and that there was substantial discrepancies in this bill, and that was the reason we had not paid them; and it was further verified that our argument with them was bona fide in that they later accepted a lesser amount in settlement of their indebtedness.

Q. Now, right there, Mr. Norman: They did not accept it in settlement of their indebtedness, did they? You paid a certain amount in settlement of Southern's liability to Atlas under the Miller Act, still leaving wide open the whole bill of Atlas against Joe Pickard, Pickard Engineering Company, didn't you?

[fol. 178] A. That's correct, sir; but they credited Mr. Pickard's overall account by the $35,000 that was paid. They don't get it twice. They have gotten it from us once, and they will never get it from Mr. Pickard; and so far, we haven't got credit for it in any suit against Mr. Pickard. We are claiming it here for that reason.

Q. You mean they will never get that $35,000 from Mr. Pickard?

A. That's right. That has already been collected by Atlas. That's right.

Q. Yes, sir.

A. And I want to say further that this last paragraph shows the real reason for putting this in, and that is to show that we had not defaulted in our agreements with Atlas except to the extent that we refused to pay this incorrect bill and that Atlas didn't furnish—didn't fail to furnish materials as required to either Pickard or to Southern, which was the gist of our motion for summary judgment down there; and that was that Pickard had failed to show that he was actually prevented from performing, and this affidavit was given for the purpose of showing that he was not prevented from performing by Atlas or by any other subcontractor or materials.

FURTHER EXCERPTS FROM THE TESTIMONY OF MR. BAXTER, TESTIFYING IN THE PRESENCE OF THE JURY:

RICHARD J. BAXTER, recalled in behalf of the defendants, in surrebuttal, testified as follows:

Direct examination.

By Mr. Harbison:

Q. Mr. Baxter, you testified here yesterday, and I just want to ask you one or two questions. Why did Southern
fol. 179 Construction Company not make payments to the Atlas Supply Company during the year 1955 other than the $13,000 that has been stipulated?

A. We had paid the $13,000 to Atlas Supply Company, and they apparently advanced the money to Pickard; and they credited our Fort Campbell account, but added that amount to our Fort Benning account. So, actually, we received no credit for the joint check we issued to Atlas Supply Company and Pickard.

Q. Were there any other reasons?

A. Well, actually, when we first went in business—when we first executed the contract and started in business with Mr. Pickard, he was obligated to furnish me a bond to protect me for the payment of materials on his part. When he failed to obtain the bond, my subcontract agreement

gave me the right to withhold payments to him until I had proof of payment by him so I wouldn't be responsible for further payment.

Q. Did you later make some agreement with him?

A. On October 7th we made an agreement with Pickard Engineering Company where we waived the bond.

[fol. 180] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

For the Middle District of Georgia,

Columbus Division.

Civil Action No. 652.

THE UNITED STATES OF AMERICA for the use of SAMUEL J. PICKARD, doing business as PICKARD ENGINEERING COMPANY, 6230 Third Street, Northwest, Washington, D. C., Plaintiff,

v.

SOUTHERN CONSTRUCTION CO., INC., Old Savannah Road, Augusta, Georgia, and CONTINENTAL CASUALTY COMPANY, Defendants.

ORDER OF UNITED STATES JUDGE—December 30, 1959

Bootle, District Judge:

This is a suit brought under the Miller Act by Samuel J. Pickard, doing business as Pickard Engineering Company, against Southern Construction Co., Inc., and Continental Casualty Company, its surety. The pleadings as amplified by a pre-trial statement set forth the following contentions. Southern entered into three contracts with the United States for the improvement of barracks, bachelor officers' quarters and mess halls at Fort Benning, Georgia. [fol. 181] Thereafter and on May 5, 1955, Pickard entered into subcontracts with Southern agreeing to do all of the plumbing and heating work on these jobs. It is stipu-

lated that the total subcontract price was $513,075.11 as of January 17, 1956 and that of this amount there was paid by Southern to Pickard or on his behalf the total sum of $431,925.90 prior to January 17, 1956. (Southern contends that the final contract price was $509,646.96, but this figure is not stipulated.)

The complaint filed December 26, 1956 alleges in part as follows:

> "7. Under the terms of the aforesaid subcontracts, defendant Southern Construction Co., Inc., was obligated to pay plaintiff for the work as it progressed, and this it failed to do. Instead, defendant Southern Construction Co., Inc., unreasonably and without just cause withheld for unduly long periods of time large sums of money which plaintiff had earned, in violation of its payment obligations, thus rendering it impossible for plaintiff to meet its payment obligations to its suppliers, and its labor and materialmen.
>
> "8. Although plaintiff made prompt and timely demand for payment, both orally and in writing, full payment of earned money was refused. In an effort to remedy the conditions of financial stress created by these wrongful acts of the defendant Southern Construction Co., Inc., the parties met on or about the 7th day of October, 1955, with the result that a Supplemental Agreement was executed on that date providing, among other things, that said defendant would release to plaintiff sufficient money to meet its payrolls each week, up to a stated maximum, and providing further that said defendant would pay directly all suppliers and materialmen whose bills plaintiff [fol. 182] certified to be correct. Defendant Southern Construction Co., Inc., wholly failed to meet its obligations under the aforesaid Supplemental Agreement in that it failed to pay suppliers and materialmen in any substantial amounts. . . .
>
> "13. There was earned by plaintiff under said contracts the sum of One Hundred Twenty Thousand Dollars ($120,000.00) which remains unpaid by defendant Southern Construction Co., Inc."

The complaint then prays for judgment in the amount of $120,000.00.

The pre-trial statement handed up on the morning of the first day of the trial contains these amendatory provisions:

> "Plaintiff requests that the complaint be further amended by striking the last six lines of paragraph 8, and substituting the following:
>
> '. . . defendant would pay either jointly to Pickard and to subcontractors or materialmen, or to Pickard, as Southern is paid on requisitions which include labor and/or material furnished by such subcontractors and/or materialmen. Defendant, Southern Construction Co., Inc., wholly failed to meet its foregoing obligations under the aforesaid Supplemental Agreement.'
>
> Plaintiff also requests that the complaint be amended by striking out paragraph 13 of the complaint and paragraph 2 of the prayers, and by substituting for paragraph 13 the following:
>
> '13. There was expended by plaintiff in the performance of said contracts the sum of One Hundred Sixty-two Thousand Seventy-one and 16/100 [fol. 183] ($162,071.16) Dollars, which remains unpaid by defendant Southern Construction Co., Inc.'
>
> And that there be substituted for paragraph 2 of the prayers, the following:
>
> '2. That plaintiff be awarded judgment against defendants on a quantum meruit basis the sum of One Hundred Sixty-two Thousand Seventy-one and 16/100 ($162,071.16) Dollars, with interest and costs.'"

Southern and Continental answered denying any and all breaches, and Southern counterclaimed alleging that Pickard defaulted in the performance of each of the contracts

and failed to perform the covenants and conditions as set forth in said contracts in articles II, III, VI, VIII, IX, XII, and XIII, and that Southern, in fulfillment of its covenants and obligations as prime contractor, was required to complete the work under each of said contracts, and in paragraph 3, as amended by the pre-trial statement, alleged:

> "3. Defendant has paid, either to the above-named plaintiff or for the account of plaintiff, or has paid to subcontractors and materialmen in order to complete said contracts after default by the plaintiff, the total sum of $580,511.41, which sum is in excess of the aggregate contract price of $508,511.41 of all four of said contracts as described in paragraphs 3, 4, 5, and 6 of plaintiff's complaint, and the plaintiff, Samuel J. Pickard, doing business as Pickard Engineering Company, is indebted to this defendant at the present time for the excess of $72,061.78."

(The reference probably should have been to three contracts instead of four and to paragraphs 3, 4, and 5 of the [fol. 184] complaint rather than to paragraphs 3, 4, 5, and 6 inasmuch as 6 referred to a Fort Campbell, Kentucky job not here involved:) The prayer of the counterclaim as amended, is for judgment for $72,061.78.

The pre-trial statement sets forth Pickard's contentions as follows:

That each contract was breached by Southern in that 1) payments were not made in accordance with such contract; 2) Southern removed Pickard from the contract work by contracting with another contractor for its completion; and 3) there was undue interference by Southern with the contract work of Pickard.

That Pickard is entitled to damages for breach of contract on a quantum meruit basis.

The pre-trial statement sets forth Southern's contentions as follows:

There was no material breach of any of the contracts by Southern.

Each contract was breached by Pickard prior to its completion, and it became Southern's right under the contracts to complete the work of each of them.

Southern is entitled to recover from Pickard on its counterclaim for the excess cost of completing the work which Southern contends was abandoned by Pickard.

Pickard breached the contracts in failing to complete the work in accordance with their terms.

It was stipulated that Southern, pursuant to the supplemental agreement of October 7, 1955, advanced for labor under the terms of said agreement and prior to January 13, 1956 a sum in excess of $60,000.00 exclusive of the payroll of January 13, 1956.

[fol. 185] The arithmetical contentions can be capsuled as follows:

As shown by Exhibit P-11, Pickard says that the toal contract price was	$513,075.11,
and that there has been paid to him or for him	433,865.60,
leaving a maximum contractual recovery of	$ 79,209.51.
But he says he has spent	$595,936.76,
receiving only	433,865.60,
leaving due him on a quantum meruit basis	$162,071.16.
As shown by Exhibit D-GG, Southern says that its total cost including payments to Pickard and for his account and for completing the work he abandoned was	$579,535.09,
that the total contract price after adjustment was	509,150.31,
and that it is out of pocket	$ 70,384.78.

The jury awarded Pickard $24,369.40, and the question here on this motion of Southern and Continental for a judgment in their favor on the main case in accordance with their motion for directed verdict made at the close

of all the testimony on the grounds as stated in said motion for directed verdict and notwithstanding the said verdict is whether the verdict can stand.

Jury verdicts are not lightly to be overturned. Courts are not free to reweigh the evidence and set aside the verdict merely because the jury could have drawn different inferences and conclusions or because judges feel that other results would be more reasonable. To justify directing a verdict or granting a judgment notwithstanding the verdict, every inference favorable to the party against whom the motion is made must be accorded, and if reasonable men might differ as to the propriety of a verdict in such person's favor, the motion to direct a verdict or to grant a judgment notwithstanding the verdict should be denied. *Collazo* v. *John W. Campbell Farms*, 213 F. 2d 255, 257 (5th Cir. 1954); *Lake County* v. *Massachusetts Bonding & Insurance Co.*, 75 F. 2d 6, 8 (5th Cir. 1935); *Marsh* v. *Illinois Cent. R. Co.*, 175 F. 2d 498, 500 (5th Cir. 1949). [fol. 186]

But the converse is also true; and if there is no evidence which, if believed, would authorize the verdict, the motion should be granted. "In short, the motion (for judgment notwithstanding the verdict) raises a question of law only, whether there is any evidence which, if believed, would authorize the verdict against the movant." 10 Cyclopedia of Federal Procedure, sec. 35.14 [at 160] (3d ed. 1951). No jury or other fact-finder can disregard the reasonable and uncontradicted testimony of unimpeached witnesses. *Deitz* v. *Greyhound Corporation*, 234 F. 2d 327 (5th Cir. 1956); *Benton* v. *Blair*, 228 F. 2d 55 (5th Cir. 1955).

After carefully considering the record in this case this court is of the opinion that it contains no evidence which would authorize this verdict or any other verdict in Pickard's favor. This court conceives it to be his duty, therefore, to grant this motion of the defendants for a judgment in their favor on the main case. Because of the natural reluctance to set aside a jury verdict or to grant a judgment notwithstanding such verdict and because of the diverse contentions of the parties and the vigor with which these contentions are espoused by counsel, a fairly succinct

setting-forth of the views which impelled the court to this conclusion would seem to be in order.

[fol. 187] Pickard must and does base his claimed right of recovery solely on the legal principle of rescission. This is necessarily true because he neither alleges nor attempts to prove performance, either total or substantial. The original complaint left somewhat vague the theory upon which he wished to proceed. It alleged a breach by Southern in that Southern unreasonably and without just cause withheld for unduly long periods of time large sums of money which Pickard had earned and then alleged that Pickard earned "under said contracts" $120,000.00 which remained unpaid. The contracts were dated May 5, 1955. Pickard's work began shortly thereafter and continued until January 17, 1956, when he quit work under circumstances hereinafter to be related. This suit was filed near the end of that year, on December 26, 1956. Under the evidence, at no time prior to or up to the filing of this suit did Pickard claim a rescission of the contracts. Subsequent to the filing of the complaint and at the hearing of the defendants' motions for summary judgment, which were overruled, Pickard advanced the theory of rescission and claimed that there had been such substantial breaches by Southern as to permit Pickard to treat as rescinded the original contracts and also said contracts as amended by the supplemental agreement of October 7, 1955. This position was adhered to by Pickard at the trial; and presumably in order to bring the original complaint, filed nearly one year after Pickard's suspension of work, into alignment with the theory of rescission, the complaint was amended by striking out paragraph 13 of the complaint which alleged that $120,000.00 had been earned "under said contracts," and by substituting the allegation that "[t]here was expended by plaintiff in the performance of said contracts the sum of One Hundred Sixty-Two Thousand Seventy-One and 16/100 ($162,071.16) Dollars, which remains unpaid by defendant Southern Construction Co., [fol. 188] Inc.," and by striking the prayer for judgment for $120,000.00 with interest and costs, and by substituting therefor the prayer for $162,071.16 "on a quantum meruit basis."

It seems to this court that there are several reasons why, as a matter of law under the evidence in this case, Pickard is not entitled to any recovery on the theory of rescission, on which theory he finally elected to proceed and by which election he is bound.

In the first place Pickard could not elect to rescind the contracts unless there were some substantial breach on the part of Southern. "Before partial failure of performance by one party will excuse the other from performing his contract or give him a right of rescission, the act failed to be performed must go to the root of the contract. *Lewis v. Chisholm*, 68 Ga. 45 (sic.)." *Chamberlin* v. *Booth*, 135 Ga. 719, 720 (1911); 12 Am. Jur., *Contracts*, sec. 438 (1938), also secs. 440 and 441; 9 Am. Jur., *Building and Construction Contracts*, sec. 78. If it were not for the supplemental agreement of October 17, 1955, it may well be that there would be an issue of fact for the jury as to whether Southern's withholding of payments prior to that date would constitute such a substantial breach as to afford Pickard grounds for rescission if properly availed of by Pickard for that purpose, *Guerini-Stone Co.* v. *P. J. Carlin Constr. Co.*, 248 U. S. 334, 344, 63 L. Ed. 275, 285 (1919); *Chamberlin* v. *Booth*, supra; *Knutson* v. *Metallic Slab Form Co.*, 128 F. 2d 408 (5th Cir. 1942); *Pasquel* v. *Owen*, 186 F. 2d 263 (8th Cir. 1950), in view of Pickard's testimony to the effect that Southern waived the positive contract requirement that Pickard furnish bond (R. 62), notwithstanding Southern's stout denial of such alleged waiver. But for such contended-for waiver of bond, it would seem that Southern was amply justified in withholding the payments. [fol. 189] Certain it is, however, that by the signing of said supplemental agreement Pickard waived, or more accurately speaking sold, his right to make any further complaint with respect to any withholding of funds by Southern prior to October 7, 1955. Nor could Pickard even prior to the signing of the supplemental agreement successfully claim rescission because of the alleged interference with Pickard's performance by Southern through alleged delays caused by alleged lack of organization of the work. Article III (c) and article III (d) of the contracts afford Pickard full, complete and exclusive relief

for any possible delay caused by Southern and completely negative Pickard's right to claim rescission because of delay. These articles read:

> "Article III (c). The Contractor shall not be liable to the sub-contractor for delay to sub-contractor's work by act, neglect or default of the owner . . . or any other cause beyond Contractor's control or on account of any circumstances caused or contributed to by the subcontractor. . . .
>
> "Article III (d). Should subcontractor be delayed in his work by the Contractor, then Contractor shall owe subcontractor therefor only an extension of time for completion equal to the delay caused, and then only if a written claim for delay is made to Contractor within forty-eight hours from time of the beginning of the delay."

Pickard made no written claim for delay as required by article III (d). In *Austin-Griffith* v. *Goldberg*, 234 S. C. 372, 79 S. E. 2d 447 (1953), the court in discussing an almost identical provision well stated:

> "Where the contract stipulates that there must be written application of demand for extension of time, [fol. 190] an oral demand is insufficient. United States v. Cunningham, supra, 125 F. 2d 28. In Chapman Decorative Co. v. Security Mut. L. Ins. Co., supra, 149 F. 189, 191, the Court stated one of the purposes of such a provision as follows: 'Its purpose evidently was to avoid just such a contest as the plaintiff here seeks to raise. In the absence of a claim for extension for delay, the defendant had a right to presume, either that no valid ground to ask an allowance existed; or, if it existed, it was not serious enough to call for an extension.' In J. G. Wagner Co. v. Cawker, supra, 112 Wis. 532, 88 N. W. 599, 602, the Court said:
>
> 'The importance of this stipulation, as well as its purpose is manifest. The very contest that has arisen in this case demonstrates the necessity of some such cautious provision. Disputes frequently arise be-

tween different contractors, or the owner and the architect, as to responsibility for delays in the work. Owners are very much in the power of contractors and architects. To avoid the uncertainty of verbal disputes, and *to prevent the contractors from making claims for delay after the building had been finished*, is clearly the purpose of such provisions. They are for the benefit of both, especially for the owner. The plaintiff knew that it could have no claim for delay for any reason unless it made a claim in writing within 24 hours after its occurrence. * * * As we have already said, the purpose of this stipulation was to protect the defendants from stale claims for delay, which might be based upon oral understandings, and made when it might be difficult to prove the facts in relation thereto.' (Emphasis ours.)"

[fol. 191] As was said by Judge Holmes, speaking for the court in City of Orlando v. Murphy, 84 F. 2d 531, 536 (5th Cir. 1936):

"What has been said applies equally to the award by the jury of damages for delay, including extra amounts paid for bond premiums. After providing in the contract for liquidated damages equal to the additional engineering expense in case of delay through the fault of the contractors, and for an extension of time to complete the contract in case of delay on account of any act or neglect of the city (expressly juxtaposing their respective rights arising from delay), the parties, in section 12 of the specifications, further restricted the liability of the city for delay by the following provision: 'Delays: No claims for damages shall be made against the City on account of delays in delivery of materials or performance of work; but should there be unduly prolonged delay in the delivery of any materials or the performance of work on the part of the City, the contractor shall be entitled to corresponding extension of time.'

"That the appellee has sought to utilize these provisions to keep the contract in force (the time for completion having been limited to two years) is shown from his demands in 1931 to have additional work desig-

nated. By these limitations in the contract and in the specifications, the parties have manifested an intention to restrict each other to the specific remedy mentioned. Since the sole recourse of the contractors for a delay by the city (whether short or unduly prolonged) was a corresponding extension of time, we think the claim for damages for delay, including extra bond premiums, should have been disallowed. Wells Bros. Co. v. United States, 254 U. S. 83, 41 S. Ct. 34, 65 L. Ed. 148; Wood v. United States, 258 U. S. 120, 42 S. Ct. 209, 66 L. Ed. 495."

[fol. 192] Moreover, there is no evidence that Southern actively interfered with the work of Pickard. The evidence at most indicates only poor co-ordination and delay resulting therefrom. Not only is Pickard barred from claiming damages or rescission for delays by the terms of his contract, he having failed to file a written claim for damages for delay as required by the contract, but it is a well-settled principle of law applicable to building contracts that delay cannot ordinarily constitute grounds for rescission. In 12 Am. Jur., *Contracts*, sec. 441 (1938), it is said:

"In accordance with the rule that the breach of a covenant which does not go to the whole consideration of the contract and is subordinate and incidental to its main purpose does not entitle the injured party to rescind, the courts agree in holding that where performance upon a precise date is not vital and may be compensated in damages, mere delay, in the absence of fraud or the like, will not justify the other party in rescinding the contract."

In *Sanders* v. *Meyerstein*, 124 F. Supp. 77, 83 (D. N. C. 1954), the court held:

"Rescission of a contract by one party is justified if the other party commits a material breach of the contract, 12 Am. Jur., Contracts, Sec. 438; 17 C. J. S., Contracts, Sec. 422, or by his fault makes substantial performance of his contract obligation impossible. 12 Am. Jur., Contracts, Sec. 443; 17 C. J. S., Contracts,

Sec. 430. Unless time is of the essence of the contracts, delay in performance is not considered a material breach justifying rescission. 12 Am. Jur., Contracts, Sec. 441; 17 C. J. S., Contracts, Sec. 422. Under the facts found, especially the finding that no specific time for completion of the voyage was agreed upon, libelant's delay in the Norfolk to Morehead City por-
[fol. 493] tion of the voyage was not a material breach of the contract giving respondent the right to rescind."

In *Knutson* v. *Metallic Slab Form Co.*, supra, at p. 410, Justice Sibley, speaking for the court, said:

"The other defaults are not refusals of Knutson to do what he had expressly agreed to do, but failures to act as well or as promptly as he should pursuant to his implied obligation to so conduct his own work as to enable Metallic to do its work with reasonable facility. *The particular complaints are that the whole job was not well organized*, lines and grades not promptly established, a caved excavation not soon cleared out, backfilling not done, and reinforcing steel not furnished as needed, and the like, so that Metallic's work, *though not stopped, was delayed and made more expensive. Every such failure in either party is not ground to rescind a building contract.* Its main purpose is to get the building constructed. Such contracts generally provide damages for delays, and adjustments by the architect. Where these afford a fair redress, failures which do not stop the work or amount to a refusal to perform ought not to end the undertaking. *Certainly* they ought not, unless expressly asserted and promptly acted on as ground for rescission; for where a right to rescind arises it is ended by an election to proceed with the contract. Thus where one party delays the other additional time is often considered the remedy. 9 Am. Jur., Building Contracts, Sec. 51. Even when payment is not made when due, it is not sufficient reason to stop work unless it really prevents work. Id., Sec. 57. In Chamberlin v. Booth & McLeroy, 135 Ga. 719, 70 S. E. 569, 35 L. R. A., N. S., 1223, it is said in such a case a partial failure of performance will not

> give the other party a right to rescind unless the act [fol. 194] failed to be performed goes to the root of the contract, and there ought not to be a rescission where there may be compensation in damages. All the things here complained of can be set right by damages, and were so remedied in the judgment. *None were made ground for quitting* when they happened, but the contract was adhered to and the work went on." (Emphasis supplied.)

But be all of the foregoing as it may, Pickard must face up to the stern realities of his supplemental agreement. "Pickard hereby waives all claims against Southern as a result of the withholding of any funds due Pickard on requisition in lieu of bond. . . . " That language speaks for itself, and certainly Pickard could no longer complain of the withholding of funds prior to October 7, 1955, and for the reasons above stated, there was no such interference or delay prior to October 7, 1955, as would constitute such a substantial breach as to authorize a rescission. Furthermore, under the doctrine of election, Pickard, with full knowledge on October 7, 1955, of whatever interference and delays he had suffered, then and there solemnly, under his signature and seal, elected not to treat the three contracts as rescinded, but to amend them and supplement them by said supplemental agreement, and then and there accepted the substantial payments and other benefits accruing to him under the said supplemental agreement. Under the doctrine of election, it was too late for him, at the end of the year 1955 or thereafter, to reassert, for the purpose of rescission, such abandoned complaints as to interference and delays.

It is my view also that there is no evidence indicating any such substantial breach by Southern after October 7, 1955, as would authorize rescission. This supplemental agreement provided that Southern should withhold all fur- [fol. 195] ther payments until the completion of jobs and acceptance by the Government, excepting only certain payments specifically called for by the contract, "plus additional payments which will be made by Southern either jointly to Pickard and to subcontractors or materialmen, or to Pick-

ard, as Southern is paid on requisitions which include labor and or material furnished by such subcontractors and/or materialmen." By stipulation, it was agreed that Southern had made all payments called for by the supplemental agreement other than those called for by the above-quoted language from paragraph 5. Pickard contends that there was substantial breach by Southern of the obligations of the last-quoted language. I think the evidence shows affirmatively that there was no such breach. Shortly after the supplemental agreement was signed, and on November 14, 1955, Pickard, by his authorized attorney, mailed to Southern a list of amounts due and owing to materialmen and subcontractors for payment by Southern and certified by Pickard in writing personally as due and owing. On December 8, 1955, the same authorized attorney for Pickard wrote Southern a letter, saying in part:

> "I have just endorsed for deposit, and the Pickard Engineering Company is sending out the monies represented by your checks, dated November 30, 1955. . . . I am now having prepared and will send to you within the next day or so another list of creditors for materials and/or subcontracting on these jobs, which have been incurred by Pickard Engineering and which, pursuant to our agreement with you, should be paid by you to Pickard Engineering Company for transmittal by it to the creditors" (R. 833, 834).

The promised "another list" was never received by Southern. Southern never received from Pickard or his authorized attorney any written notice as to other creditors who [fol. 196] were due to be paid except the correspondence about the Atlas Construction Company, hereinafter discussed, unless it be perhaps on some one or two approvals Southern wrote for. After promising in writing to send Southern the list of any additional creditors to be paid (to be certified by Pickard personally, presumably, as the first list was) and thus, at least inferentially, warning Southern not to pay claimants unless they were so certified, Pickard cannot put Southern in substantial default without following through by sending the promised list. It will be remembered that Pickard's original, unamended complaint

in paragraph 8 interpreted the supplemental agreement as "providing further that said defendant would pay directly all suppliers and materialmen whose bills plaintiff *certified* to be correct." (Emphasis added.) The record shows without dispute that all of the bills certified in the letter of November 14, 1955, were paid in full except one for Clarke Baridon (R. 156), and because the Government had not approved some of Clarke Baridon's work it was agreed between Southern and Pickard's authorized attorney that Clarke Baridon would not be paid (R. 156, 838). $5,000.00 was later paid on that bill, however, by Southern (R. 838). Pickard contends that Southern committed a substantial breach of the supplemental agreement by not paying Atlas Supply Company. The record shows, however, that the Atlas claim was in dispute and was never certified by Pickard as being correct, either in the letter of November 14, 1955, or in any other letter or writing (R. 165). Moreover, the account of Atlas was incorrect by $23,000.00 by Pickard's own testimony (R. 167). Pickard requested of Southern a conference which was granted "to try to straighten the account out and collect the money" (R. 165). Defendants' Exhibit "M" shows that this $23,000.00 incorrect charge, admitted by Pickard, was not corrected by Atlas on its statements prior to Pickard's leaving the job in Janu[fol. 197] ary, 1956. It would seem that Southern could not be placed in substantial default by failing to pay an unlisted, uncertified, incorrect bill. At the above-mentioned conference on December 16, 1955, Atlas was claiming about $175,000.00, and Pickard "finally agreed to accept the $100,000.00 which Southern paid." Perhaps confirmatory of the uncertainty in the Atlas bill is the fact that its claimed indebtedness of $138,000.06 was finally settled for $35,000.00 (R. 651).

It would seem that if Southern were delinquent at all in not paying more quickly and more substantially to Atlas, Pickard having failed to certify the correctness of the Atlas claim, any possible breach of contract attributable to such failure to pay more quickly and more substantially could not be elevated to the magnitude of such a substantial breach as to authorize a rescission. Any failure of Southern to pay Pickard's materialmen would not authorize

a rescission by Pickard unless such failure went to the root of the contract and "prevented or made impossible" Pickard's performance. *Chamberlin v. Booth*, supra; *Lewis & Co. v. Chisolm*, 68 Ga. 40 (1881); *Guerini Stone Co. v. P. J. Carlin Constr. Co.*, supra; *Knutson v. Metallic Slab Form Co.*, supra; *Pasqual v. Owen*, supra. There is no evidence that any alleged delinquency on Southern's part prevented or retarded performance by Pickard's subcontractors or materialmen.

The only other breach contended for by Pickard is that Southern threw him off the job and wrongfully replaced him by another contractor. Unfortunately for Pickard, the evidence would not support any finding to that effect, and, on the contrary, shows affirmatively that Pickard abandoned the job (R. 233), removing therefrom his tools (R. 120, 232) and all of his men except a superintendent and a truck man (R. 231), because he could not meet his pay-[fol. 198] rolls (R. 119, 231). The evidence establishes further that he had no plans or intention of returning to the job or resuming work thereon (R. 121, 235) unless Southern would agree to supply additional payroll funds (R. 121), which Southern was under no obligation to do, it having already advanced more than the supplemental agreement required (R. 181).

The evidence shows that Pickard could not meet his payroll, due Friday, January 13 (R. 231). He wired some money which did not arrive in time. Meanwhile Southern, though under no obligation to do so, flew in some money out of which the men were paid off on Saturday, one day late. Pickard's failure to meet this payroll constituted a breach of article VI of the contract.

On January 16, 1956, Pickard removed "the pipe machines and equipment" from the job (R. 120, 232). This constituted a breach of article VI of the contract.

On January 17, 1956, at noon, Pickard terminated the employment of his entire force, save only his superintendent and a truck man, and allowed them to leave the job without instructions as to returning (R. 225). This constituted a breach of article VII of the contract.

With these three breaches on Pickard's part facing Southern, Southern not being responsible for any of them and

having gone the second mile by meeting Pickard's payroll of the 13th, it would not seem to constitute a breach of the contract that Southern immediately thereafter (and the testimony is all uncontradicted that it was thereafter) began to make preparations to continue the work in the event that Pickard, who had not communicated with Southern during these events of January 13, 16 and 17, had indeed abandoned the work as would be quite apparent to a reasonable prime contractor from the events of those days. [fol. 199] Pickard cannot complain that before 10:00 P. M. of the day on which he had "paid my men off" (R. 121) Southern was in touch with another contractor. This view works no injustice in this case, particularly since Southern did not misjudge Pickard's intention in removing his tools and equipment and in paying his men off. When he met with Southern's representatives on January 19 or 20, 1956, it developed that he had no plans or intention of resuming work unless he could "have some agreement with him [Southern's representative] as to money for payrolls" (R. 121). While Pickard testified that he "found out" that in less than 24 hours after he had paid his men off there was another contractor in there, actually the evidence shows that such men were there making a survey and there was no binding contract between Southern and the new contractor until after the job was surveyed and until the letter agreement of January 23, 1956 (R. 806-807, 1077, 1079, 1095, 1096), which date was after the conference of January 19 or 20, 1956, when Pickard advised Southern, in effect, that he was unable to resume work unless Southern furnished payroll money (R. 121, 192). It ill behooves Pickard to complain of Southern's dispatch in arranging for resumption of work which he found himself required to abandon in view of Southern's legal duty to minimize damages.

Thus no substantial breach, not waived by the supplemental agreement, has been proved against Southern, and that fact alone should be dispositive of the question now before this court.

In the second place, Pickard cannot claim rescission because, under the evidence above discussed, the substantial breach shoe is on the other foot. He breached the contract in the material respects above pointed out, and actually

abandoned the work because of his inability to finance the payrolls. The law is clear that one who has himself first [fol. 200] committed an unwaived, substantial breach of a contract cannot claim rescission, even if there exists a subsequent substantial breach by another party.

> "The party who seeks to rescind a contract because of the other's default must show that he had done all that he was required to do in order to entitle himself to a performance of it by the other party. A party who has substantially broken the contract cannot rescind it on the ground that the other party subsequently refuses or fails to perform." 12 Am. Jur., *Contracts*, sec. 438 (1938).

Pickard's failure to meet the payroll, removal of his equipment, dismissal of his force, failure to notify Southern of his actions, failure to resume work and offer to resume work only upon the condition that Southern advance payrolls which it was under no obligation to advance, of themselves, and, as a matter of law, constituted an abandonment of the project and also:

1) A failure to "carry on said work promptly, efficiently, and at a speed that will not cause delay in the progress of contractor's work or other branches of the work carried on by other subcontractors," as provided by article III of the subcontract.

2) A failure "to prosecute the said work with promptness, diligence and efficiency," as provided by article XIII of the subcontract.

In the third place Pickard cannot claim rescission at this late date after he with full knowledge of all matters of which he now complains (save possibly some of his contentions as to another contractor being on the job within 24 hours after he paid his men off, which has been discussed above) continued to rely upon the contracts, as amended, accepted payments thereunder, and as late as the [fol. 201] final conference on January 19 or 20, 1956, wanted to proceed under the contract if Southern would put up more money, which it was under no obligation legally to do.

> "A right to rescind, abrogate, or cancel a contract must be exercised promptly on discovery of the facts from which it arises; it may be waived by continuing to treat the contract as a subsisting obligation." 12 Am. Jur., *Contracts*, sec. 447 (1938).
>
> "A party to a contract who, after discovery or knowledge of facts which would entitle him to rescind, treats the contract as a subsisting obligation and leads the other party to believe that the contract is still in effect waives his right to rescind." 12 Am. Jur., *Contracts*, sec. 449 (1938).

The facts of this case are quite similar to those in the case of *United States* v. *America Construction Co.*, 168 F. Supp. 760 (D. Mass. 1958), in which defendant's motion for summary judgment was sustained. As is said in 3 Williston, *Contracts*, sec. 687:

> "The commonest case of election in the law of contracts arises where with knowledge of a breach of condition or defense excusing performance, a promissor either refuses or continues to accept performance from the other party. As the only theory upon which the benefit of such performance can be rightfully received is on the assumption of an election to continue the contract, that assumption is made if the injured party accepts further performance."

Further, in Section 688, Williston says:

> "The principle is general that wherever a contract not already fully performed on either side is continued in spite of a known excuse, the defense thereupon is lost and the injured party is himself liable if he subsequently fails to perform."

[fol. 202] See also *McCormick* v. *Lewis*, 201 F. 2d 861 (5th Cir. 1953), in which Judge Hutcheson, writing for the court, said:

> "[W]e agree with the view of the court that no ground for rescission or other equitable relief was

shown. Indeed, when it is considered that, with full awareness of all the matters of which he now complains, he did not then complain of them, declare the contract at an end, and demand the return of the moneys he now sues for, but reaffirmed the contract and solicited and received a thirty day extension of time in which to perform it, it is quite plain that he condoned and waived the matters of which he now complains (citing Secs. 483 and 484, Vol. 2, Restatement Contracts, p. 923; 12 Am. Jur., Contracts, Secs. 447 and 449; McLean v. Clapp, 141 U. S. 429, 12 S. Ct. 29, 35 L. Ed. 804; 9 Am. Jur., Cancellation, Sec. 46, p. 389)."

This well-known principle was restated in the recent case of *United States for the use and benefit of Geten v. Cope et al.*, ... F. Supp. ..... (E. D. S. C. August 6, 1959):

> "This is true because there can be no quantum meruit recovery where there is a valid, unrescinded contract; and in order to rescind a contract, a party having a right to do so because of a substantial breach, must act promptly, leave no doubt as to his election to rescind, and adhere to the position taken."

Paragraph 1 of defendants' motion is to set aside the verdict and judgment and to enter judgement in favor of defendants on the main case in accordance with the motion for directed verdict made by the defendants at the close of all the testimony on the grounds as stated in said motion for directed verdict.

[fol. 203] Paragraph 2 of defendants' motion is "in the alternative, defendants move the court to set aside the verdict and judgment thereon and grant defendants a new trial on the main case" on 13 listed grounds.

Paragraph 3 of the motion is by Southern only "to set aside the verdict and judgment thereon as to its counterclaim upon all the foregoing grounds set forth in defendants' motion for new trial on the main case, and on the further ground that, if either a judgment notwithstanding the verdict on (sic) a new trial is granted on the main

case, as a matter of law, a new trial must be had on the counterclaim."

Counsel for defendants may prepare and submit a judgment in their favor on the main case, notwithstanding the verdict. This ruling makes it unnecessary for this court to rule at this time upon defendants' motion in the alternative to set aside the verdict and judgment thereon and grant defendants a new trial on the main case. *Banks* v. *Associated Indemnity Corporation*, 161 F. 2d 305, 314 (5th Cir. 1947); *Pruitt* v. *Hardware Dealers Mut. Fire Ins. Co.*, 112 F. 2d 140, 143 (5th Cir. 1940); *Vearn* v. *Crane*, 114 F. 2d 896, 897 (5th Cir. 1940). This court hereby reserves jurisdiction, however, to pass upon said last-mentioned motion at any later date in the event that it should become appropriate to do so because of a reversal of this court's rendition of judgment in defendants' favor on the main case notwithstanding the verdict, or otherwise.

The briefs heretofore submitted treat comparatively lightly Southern's motion for new trial on its counterclaim. If, in light of the views herein expressed, counsel on either side desire to say anything further with respect to said motion, they may do so by letter briefs within 10 days from the date hereof.

[fol. 204] Let the drafting of the order be deferred until a ruling has been made on Southern's motion for new trial on its counterclaim, and then, if said motion should be granted, counsel in drafting the order will doubtless want to give attention to 28 U. S. C. A. 129½ (b), and Federal Rules of Civil Procedure No. 54 (b), so as to make said order reviewable on appeal before trial of the counterclaim. *Newburgh Moire Company* v. *Superior Moire Company*, 218 F. 2d 580 (3d Cir. 1955), may be of interest to counsel.

Let said proposed order when drafted be submitted to opposing counsel who shall then have ten days for suggestions as to form.

This 30th day of December, 1959.

/s/ W. A. Bootle,
United States Judge.

Certificate of Service (omitted in printing).

[fol. 205]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
February 6, 1961

Before: Miller, Chief Judge, Cecil, Circuit Judge, and Boyd, District Judge.

This cause is argued by Edward Gallagher for appellant and by William J. Harbison for appellees and is submitted to the court.

[fol. 206]

IN THE UNITED STATES COURT OF APPEALS

JUDGMENT—August 3, 1961

Appeal from the United States District Court for the Middle District of Tennessee.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Tennessee, and was argued by counsel,

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and the case remanded for further proceedings consistent with the opinion herein.

Approved for entry:

Shackelford Miller, Jr., Chief Judge.

[fol 207] [File endorsement omitted]

No. 14239

In United States Court of Appeals

For the Sixth Circuit

Appeal from the United States District Court for the Middle District of Tennessee.

United States for use of Samuel J. Pickard, d/b/a Pickard Engineering Company, Plaintiff-Appellant,

—v.—

Southern Construction Co., Inc., and Continental Casualty Company, Defendants-Appellees.

Opinion—August 3, 1961

Before: Miller, Chief Judge, Cecil, Circuit Judge, and Boyd, District Judge.

Miller, Chief Judge.

This action was filed under the provisions of the Miller Act, Section 270b, Title 40, United States Code, in the name of the United States of America for the use of Samuel J. Pickard doing business as Pickard Engineering Company, against the appellees, Southern Construction Company, Inc., hereinafter called Southern, and Continental Casualty Company, surety on its performance bond, to recover on a construction contract alleged by Pickard to have been breached by Southern.

Southern Construction Company was the prime contractor on a project for the rehabilitation of certain barracks at Fort Campbell, Tennessee. On May 5, 1955, Pickard entered into a subcontract with Southern to do all the

plumbing and heating required in the specifications of the prime contract at the contract price of $50,000.00. The complaint alleged that under the subcontract Southern failed to make the required progress payments to Pickard. [fol. 208] as the work progressed; that without justification it withheld funds from the plaintiff for long periods of time, rendering it impossible for plaintiff to meet its payment obligations to its suppliers, labor and materialmen; that despite the failure of Southern to abide by the contract, plaintiff prosecuted the work to substantial completion but received from Southern only one progress payment in the amount of $13,000.00. Plaintiff sued for the specified contract price of $50,000.00 less this payment of $13,000.00.

Under the subcontract Pickard was required to furnish a performance bond to Southern in the amount of $50,000.00, guaranteeing faithful performance of the subcontract. Pickard was unable to furnish the required performance bond on this project, and remained unbonded throughout the course of this work. Work began on the contract by Pickard in May or June 1955 and continued until December 16, 1955.

Simultaneously with the performance of the work at Fort Campbell, Tennessee, Pickard was performing similar work on much larger subcontracts which he held with Southern for rehabilitation of barracks at Fort Benning, Georgia. Pickard's primary supplier for both the Fort Campbell project and the Fort Benning project was the Atlas Supply Company.

On October 7, 1955, there was executed a supplemental agreement between Pickard and Southern, which recited that Pickard held three subcontracts with Southern at Fort Benning and one subcontract for work at Fort Campbell; that Pickard had been unable to obtain performance bonds on the various jobs; that Southern had been holding certain funds due him in lieu of said bonds; and that Pickard was in need of funds with which to complete the jobs and to pay other bills. Under this agreement Southern waived the provision requiring payment for performance bonds and Pickard waived all claims against Southern as a result of the withholding of any funds due Pickard on requisition in lieu of bond. Pickard further authorized Southern to

withhold all other and further payments on work completed or to be completed during the course of said jobs, until the completion of each job by Pickard and the final acceptance and payment thereof by the Army to Southern, excepting payments therein agreed to be made, "plus additional payments which will be made by Southern either jointly to Pickard and to subcontractors or materialmen, or to Pickard, as Southern is paid on requisitions which [fol. 209] include labor and/or material furnished by such subcontractors and/or materialmen."

After October 7, 1955, and prior to December 16, 1955, when Pickard withdrew from the job, Southern received from the Government two payments, one on October 17, 1955, in the amount of $12,002.46 and one on November 4, 1955, in the amount of $15,512.95. Southern failed to pay appellant or his suppliers or materialmen as it received these payments from the Government, as required by the contract.

On December 16, 1955, Pickard's men left the job at Fort Campbell, Tennessee, and were never heard from again. No notice of any sort was given by Pickard, his foremen or any representative on his behalf of the withdrawal, the purpose thereof, or the reasons therefor. At the time when Pickard withdrew from the Fort Campbell project, the work required there under his subcontract was from 96% to 98% completed. Southern completed the work at Fort Campbell and obtained final settlement from the United States Government in April 1956.

Shortly after Pickard left the work at Fort Campbell he also left the Fort Benning project.

On October 7, 1955, when the supplemental agreement was executed, and continuously thereafter to the time when Pickard left the Fort Campbell job there was an unpaid balance in the amount of $34,520.00 on the account to the Atlas Supply Company for materials furnished by Atlas at Fort Campbell. In addition to this amount, Atlas Supply Company was claiming a balance due it from Pickard in the sum of $104,000.00 on the Fort Benning job. Southern did not dispute the amount of the Atlas account at Fort Campbell. However, it disputed the Fort Benning claim of Atlas in its entirety. In August 1956 a conference was

had between Southern officials and representatives of the Atlas Supply Company, as a result of which Southern paid to Atlas Supply Company in August 1956 the sum of $35,000.00 and obtained from Atlas a complete release of all liability of Southern on Pickard's accounts, both at Fort Benning, Georgia, and Fort Campbell, Tennessee.

At the time when this payment was made by Southern to Atlas, Atlas had consolidated its accounts against Pickard, and was carrying them as one consolidated account. Atlas credited the $35,000.00 payment against this single account, so that Pickard received full credit for this payment on his indebtedness to Atlas. Neither Southern nor [fol. 210] Atlas at the time of this payment specifically undertook to allocate the $35,000.00 payment, or any part thereof, to one project or the other. It was a single indivisible payment applicable to both projects.

Pickard gave no credit to Southern for this payment on either job, and his books did not reflect the payment. There is no evidence that Pickard knew of the payment in August 1956 at the time when it was made. In April 1957, however, Pickard's attorneys were advised by the attorney for Southern that this payment had been made, and that the same had not been allocated by Southern either to the Fort Campbell project or to the Fort Benning project.

In December 1956 Pickard filed suit in the District Court for the Middle District of Georgia against Southern and the Continental Casualty Company on both the Fort Benning contract and the Fort Campbell project. Southern filed an answer and counterclaim, in which it alleged that it had paid to Pickard sums in excess of the total contract between the parties and sought judgment for such excess. Included in the counterclaim at this time was the $35,000.00 payment hereinabove referred to.

In April 1957, however, Pickard filed the present action in the United States District Court for the Middle District of Tennessee on the Fort Campbell project only, and this part of Pickard's claim was subsequently eliminated by amendment from the action pending in the District Court in Georgia. The action in the District Court in Tennessee was filed for "jurisdictional" reasons, in that the Miller Act provides that every suit instituted under its provisions

"shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, ..." *Section 270b(b), Title 40, United States Code.*

In the trial of the Fort Benning case in Georgia in March 1959, Pickard introduced certain exhibits in which he purported to list all of the payments made by Southern to him or on his behalf at Fort Benning, and to give credit for the same. He did not include the $35,000.00 payment made to Atlas by Southern in August 1956. Southern listed on exhibits filed in that case the payments made by it to Pickard or on his behalf on the Fort Benning job, for which Southern claimed credit. The $35,000.00 payment made to Atlas was not claimed in these exhibits. The District Judge stated that the record in the Georgia case showed that the $35,000.00 payment to Atlas was not [fol. 211] submitted to nor considered by the jury in the trial of the Fort Benning case. He found as a fact that this fund had not been litigated or adjudged by the District Court in Georgia, and that credit for it was neither given by Pickard nor claimed by Southern in the previous proceedings between the parties in that court. The District Judge stated in his findings of fact that although the $35,000.00 was included in the original counterclaim filed by Southern in the Fort Benning case, it was, prior to the trial in that case, "dropped" from Southern's counterclaim in that case, has been included by Southern as part of its counterclaim and defense in the present case, and that Southern claims credit for $34,520.00 thereof, toward the contract price of the Fort Campbell project. We are unable to tell from the record before us whether the original counterclaim in the Georgia suit was amended after the Tennessee suit was filed so as to withdraw this claim from the pleadings, or if it was "dropped" merely by the action of the parties in not presenting it in the trial of that case [compare Rule 15(b), Rules of Civil Procedure], or if it was removed from the case by pretrial procedure under Rule 16, Rules of Civil Procedure. For the reason hereinafter stated, we believe it is immaterial.

Appellant's original complaint in this action filed on April 4, 1957, sought recovery in the amount of $37,000.00

under the contract of May 5, 1955, covering the Fort Campbell job. On June 17, 1959, appellant moved to amend the complaint, and on July 31, 1959, filed an amended complaint seeking to recover $100,310.08 on a quantum meruit basis for the reasonable value of labor, materials and services furnished by him to Southern on the Fort Campbell job.

The amended complaint alleged that, except for a few minor details, appellant completed its contract work; that it became impossible to complete these details because of virtual abandonment of the prime contract work by Southern; and that such action on the part of Southern, together with its failure to make the required payments for the work as it progressed, constituted breaches of the contract by Southern entitling appellant to relief on a quantum meruit basis.

Southern filed an amended answer and counterclaim denying certain material allegations of the amended complaint, and alleging affirmatively that appellant defaulted in the performance of the contract, by reason of which [fol. 212] Southern was required to complete the work under the Fort Campbell contract, and that it had paid to the appellant or for his account in order to complete said contract the sum of $57,412.27, which was in excess of the contract price of $50,000.00. It sought judgment against appellant in the amount of $7,412.27.

The jury did not return a general verdict, but answered certain factual questions submitted to it. Three of these questions, which we think material in our present consideration of the case, are as follows:

1. Did defendant, Southern Construction Co., Inc., by so conducting its own operations, interfere with the plaintiff Pickard in the performance of his work?

   Answer: (No)

2. Did defendant, Southern Construction Co., Inc., fail to pay plaintiff Pickard or the suppliers or materialmen of Pickard as it received payments from the Government for work performed by Pickard?

   Answer: (Yes)

3. If you answer either question 1 or 2 Yes, was Plaintiff Pickard induced to leave the work, either by defendant's interfering with his work or by its failure to make payments required by the contract?

Answer: (Yes)

The District Judge held that appellant was not entitled to recover in quantum meruit and any recovery in its favor must be limited to the contract price.

The District Judge also ruled that Southern was entitled to use as a counterclaim in this action the $35,000.00 payment which it made to the Atlas Supply Company in August 1956, thus rejecting appellant's contention that under Rule 13(a), Rules of Civil Procedure, it was a compulsory counterclaim in the suit filed first in Georgia, by reason of which it was barred from being used as a counterclaim in the present action.

Applying these two rulings to the facts of the case, the District Judge held that the $35,000.00 credit, together with the other payments admittedly made by Southern on the contract, made a total in excess of the contract price expended by Southern, and since Southern in open court waived any affirmative relief on its counterclaim, judgment was entered dismissing the action and denying any [fol. 213] relief on the counterclaim. On this appeal, appellant challenges both of the rulings.

Right of Recovery in Quantum Meruit

Appellant relies upon the well settled rule that under certain conditions a material breach of contract by one of the parties thereto confers upon the other party to the contract the right to rescind and abandon the contract and to recover in quantum meruit for the reasonable value of services and materials furnished. In a building or construction contract calling for the performing of labor and furnishing of materials covering a long period of time and involving large expenditures, a stipulation for payments on account to be made from time to time during the progress of the work must be deemed so material that a substantial failure to pay would justify the contractor in declining to

proceed. Under such circumstances the contractor cannot be expected to finance the operation to completion without receiving the stipulated payments on account as the work progresses. *Guerini Stone Co. v. Carlin Construction Co.*, 248 U. S. 334, 344-345; *Pickens County v. National Surety Co.*, 13 F. (2) 758, 761, C. A. 4th; *United States v. Zara Contracting Co.*, 146 F. (2) 606, 610, C. A. 2nd; *United States v. America Construction Co.*, 168 F. Supp. 760, 761, D. C. Mass.; *Restatement, Contracts, Section 317.*

The District Judge recognized this rule but correctly pointed out that in order for the rule to be applicable the breach relied upon must be a breach which is so substantial and fundamental as to go to the very root of the contract. *Knutson v. Metallic Slab Form Co.*, 128 F. (2) 408, 411, C. A. 5th; *Pasquel v. Owen*, 186 F. (2) 263, 270, C. A. 8th; *Chamberlin v. Booth & McLeroy*, 135 Ga. 719, 70 S. E. 569, 35 L. R. A. N. S. 1223; *Brady v. Oliver*, 125 Tenn. 595, 614, 147 S. W. 1135; *Restatement, Contracts, Section 347, Comment (c).*

The District Judge ruled that appellant's contention that it became impossible to fully perform the contract on his part because of the virtual abandonment of the prime contract by Southern was answered by finding No. 1 of the jury that Southern did not interfere with appellant in the performance of his work. Finding No. 2 of the jury recognized the fact that Southern did not make payments to appellant as it received payment from the Government, as required by the contract. Finding No. 3 upheld appel- [fol. 214] lant's contention that he was induced to leave the job because of this failure to make progress payments. However, the District Judge was of the opinion that these findings did not answer the ultimate question presented, namely, whether the failure to make the payments was such a fundamental breach of the contract as to justify appellant in abandoning the contract and seeking recovery in quantum meruit instead. He was of the opinion that under the particular circumstances of this case, it was not such a breach. He pointed out that the supplemental agreement of October 7, 1955, was entered into because appellant was unable to furnish the bond required by the original contract, making it necessary for Southern to protect itself

against the claims of materialmen and suppliers of appellant; that the supplemental agreement gave Southern the option to make payments to appellant and materialmen jointly which would furnish such protection; that if the payments had been made jointly to appellant and the materialmen when received by Southern from the Government, appellant would nevertheless not have received any money; and that, accordingly, Southern's failure to make payment to the materialmen as payment was received from the Government did not interfere with appellant's performance of the contract unless a supplier refused to furnish appellant with the necessary materials because of the failure to receive payments. The evidence not only failed to show any such refusal on the part of a supplier, but, on the contrary, showed that the suppliers cooperated in furnishing what appellant needed to complete the job. The breach of an agreement which causes no loss to the plaintiff will not sustain a suit for recission. *Block* v. *City of West Palm Beach*, 112 F. (2) 949, 952, C. A. 5th; *Pasquel* v. *Owen*, supra, 186 F. (2) 263, 270, C. A. 8th. We agree with the ruling of the District Judge. *Knutson* v. *Metallic Slab Form Co.*, supra, 128 F. (2) 408, 411, C. A. 5th.

Compulsory Counterclaim

Appellant contends that the District Judge was in error in permitting Southern to include in its counterclaim in this case the $35,000.00 payment made to the Atlas Supply Company in August 1956, in that under Rule 13(a), Rules of Civil Procedure, this payment was a compulsory counterclaim which should have been filed and litigated in appel-
[fol. 215] lant's action against it in the District Court in Georgia, and therefore could not be used in this action.

Rule 13(a) provides as follows:

> "(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire

jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

Although Rule 13(a) does not expressly provide that failure to assert a compulsory counterclaim in a prior suit will bar its assertion in a later suit, such is the effect of the rule. The principle of res judicata applies to all such claims which should have been raised, even though actually omitted. *Moore's Federal Practice, Vol. 3, Sec. 13.12; United States* v. *Eastport Steamship Corp.*, 255 F. (2) 795, 805, C. A. 2nd; *Hancock Oil Co.* v. *Universal Oil Products Co.*, 115 F. (2) 45, 47, C. A. 9th; *Pennsylvania R. Co.* v. *Musante-Phillips, Inc.*, 42 F. Supp. 340, 341, N. D. Cal.; *Gallahar* v. *George A. Rhoman Co.*, 50 F. Supp. 655, 661, S. D. Georgia.

We are of the opinion that this payment arose "out of the transaction" which was the subject matter of the suit filed in the District Court in Georgia, within the meaning of the rule. "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 609-610. The test generally applied in determining whether a counterclaim is compulsory is whether there is a logical relationship between the claim and counterclaim. Only claims that are unrelated, or are related but within the exceptions stated in the rule, need not be pleaded. *Moore's Federal Practice, Vol. 3, Sec. 13.13; United Artists Corp.* v. *Masterpiece Productions, Inc.*, 221 F. (2) 213, 216, C. A. 2nd; *United States* v. *Eastport Steamship Corp.*, supra, 255 F. (2) 795, 805, C. A. 2nd; *Arvey Corp.* v. *Peterson*, 178 F. Supp. 132, 138, E. D. Pa.

[fol. 216] The $35,000.00 payment to the Atlas Supply Company was a payment on an indebtedness of appellant to Atlas Supply Company arising out of both the Fort Benning contract and the Fort Campbell contract. No part of it was apportioned to either job. The indebtedness had been consolidated into a single account. The payment extinguished all the indebtedness of the appellant to Atlas Sup-

ply Company arising out of both projects and entitled Southern to a credit of $35,000.00 against any claim that appellant might make under either of the two contracts. In our opinion, it was a compulsory counterclaim to be asserted by appellant at the time it filed its first answer and counterclaim in the suit in the District Court in Georgia.

The District Judge, in permitting the claim to be included in the counterclaim in the Tennessee suit, was of the opinion that the claim arose out of both projects; that Southern was required to use it as compulsory counterclaim when it filed its answer in the Georgia suit: that when appellant separated his claims and filed the second suit in Tennessee Rule 13(a) required Southern also to plead the same claim in the suit in Tennessee in that it also grew out of the transaction which constituted the subject matter of the Tennessee suit; that if the claim had been adjudicated in the Georgia suit, it could not be litigated a second time in the Tennessee suit; that the claim was not adjudicated in the Georgia suit; and since Southern was required by Rule 13(a) to plead it in the Tennessee suit and it had not been adjudicated in the Georgia suit, the District Court in the Tennessee suit had jurisdiction to hear and adjudicate the claim.

The District Judge also expressed the opinion that when Southern filed its answer in the Tennessee suit, this claim was the subject of another pending action, namely, the suit in the District Court in Georgia; that by reason of the exception contained in Rule 13(a), it was accordingly not a compulsory counterclaim in the Tennessee suit; but because it grew out of that transaction it was a permissive counterclaim in that suit and could be adjudicated in that suit if not previously adjudicated by the court in Georgia. The exception in Rule 13(a) provides that if the claim is the subject matter of another pending action, such claim "*need* not be so stated" (emphasis added) in the defendant's answer. It was reasoned by the District Judge that this is an exception running in favor of the defendant, which, although not *requiring* a defendant to plead such [fol. 217] a claim, gives him an option to do so if he so desires. Reliance was placed upon the discussion of this

question in *Moore's Federal Practice, Vol. 3, Section 13.11, page 38.* It will be noticed, however, that in the example there discussed, the prior pending action was filed in a state court and did not involve a compulsory counterclaim under Federal Rule 13(a).

We believe the ruling of the District Judge misconstrues the rule. Rather than being a compulsory counterclaim in both suits, we consider the claim a potential compulsory counterclaim in either of the two suits, with its compulsory status maturing in the suit in which and at the time when Southern first filed a responsive pleading. Rule 13(a) makes the counterclaim compulsory "at the time of serving the pleading." At the time when the answer was filed in the Georgia suit, the claim was not the subject of another pending action, and it was a compulsory counterclaim in that suit. If compulsory in that suit, it would not also be compulsory in a later suit. Nor should it be compulsory in one suit and at the same time be permissive in another suit pending between the same parties.

As pointed out above, the fact that it was not litigated in that suit, does not change its character as a compulsory counterclaim with the result that Southern is barred from subsequently asserting it in the present action. *United States v. Eastport Steamship Corp.*, supra, 255 F. (2) 795, 805, C. A. 2nd.

There might be merit in appellee's contention if there had been an allocation of the $35,000.00 payment between the indebtedness to Atlas Supply Company at Fort Benning and the indebtedness at Fort Campbell. But there was no allocation. In fact, at the time of the payment there was only one indebtedness, and so treated by the parties.

Appellant, in answer to the plea of inequitable hardship resulting from this ruling on a technical question of procedure, calls attention to the fact that final judgment has not yet been entered in the suit in the District Court in Georgia where the counterclaim should have been prosecuted. What effect our ruling in this case should have on that case, is not for us to say.

The rulings of the District Judge are affirmed in part and reversed in part.

The judgment of the District Court is vacated and the case remanded for further proceedings consistent with the views expressed herein.

[fol. 218] Petition for rehearing covering 16 pages filed August 22, 1961 omitted from this print.

It was denied, and nothing more by order August 30, 1961.

[fol. 219]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER DENYING REHEARING—August 30, 1961

Appellees' petition for rehearing having been considered by the Court;

It Is Ordered that said petition be denied.

Approved for entry:

Shackelford Miller, Jr., Chief Judge, U. S. Court of Appeals for the Sixth Circuit.

[fol. 220] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 221]

SUPREME COURT OF THE UNITED STATES

No. 574—October Term, 1961

SOUTHERN CONSTRUCTION COMPANY, INC., et al.,
Petitioners,

—vs.—

SAMUEL J. PICKARD, etc.

ORDER ALLOWING CERTIORARI—January 22, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961

No. 46

SOUTHERN CONSTRUCTION COMPANY, INC., and
CONTINENTAL CASUALTY COMPANY,
Petitioners,

vs.

UNITED STATES for the Use of SAMUEL J. PICKARD,
d/b/a PICKARD ENGINEERING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals
for the Sixth Circuit.**

CHARLES C. TRABUE, JR.,
Nashville, Tennessee,
Attorney for Petitioners.

Of Counsel:

TRABUE, MINICK, STURDIVANT & HARBISON,
26th Floor, Life and Casualty Tower,
Nashville 3, Tennessee,
HULL, WILLINGHAM, TOWILL & NORMAN,
Southern Finance Building,
Augusta, Georgia,
HARRY S. McCOWEN,
2634 Bank of Georgia Building,
Atlanta, Georgia.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. .....

SOUTHERN CONSTRUCTION COMPANY, INC., and
CONTINENTAL CASUALTY COMPANY,
Petitioners,

vs.

UNITED STATES for the Use of SAMUEL J. PICKARD,
d b a PICKARD ENGINEERING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioners, Southern Construction Company, Inc., and Continental Casualty Company pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on August 3, 1961, and its judgment overruling a petition for rehearing entered on August 30, 1961.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Sixth Circuit is reported at 293 F. 2d 493. The opinion of the District Court is contained in the record (23b-42b).

JURISDICTION.

The opinion of the Court of Appeals for the Sixth Circuit was filed on August 3, 1961, and a copy thereof is appended to this petition in the appendix at pp. 17-31.

Petition for rehearing was duly filed by the petitioners and was overruled on August 20, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

The sole question presented by this petition is one of the proper meaning and interpretation of Rule 13 (a) of the Federal Rules of Civil Procedure promulgated by this Court.

The facts of the case are undisputed. The petitioners, Southern Construction Company, Inc., and Continental Casualty Company, were sued by the original plaintiff, Pickard, in the United States District Court for the Middle District of Georgia on two separate contracts under the Miller Act (40 U. S. C. 270 (b)). The suit alleged breach of the two contracts by Southern Construction Company at Fort Campbell, Tennessee, and at Fort Benning, Georgia. The defendants filed an answer and counterclaim embracing all of their payments and counterclaims on both contracts.

Thereafter **the plaintiff**, Pickard, **filed a separate suit**, the present action, in the United States District Court for the Middle District of Tennessee, **suing on the Tennessee contract only.** The plaintiff did not formally delete the Tennessee contract from the Georgia case until a later time, but the plaintiff filed its separate suit in Tennessee for "jurisdictional" reasons under the Miller Act. To the Tennessee suit the defendants filed an answer and counterclaim, setting up certain payments which they claim to have been made on account of the plaintiff under the Tennessee contract.

One payment which had been made by the defendant Southern Construction Company on behalf of Pickard pertained almost entirely to the Tennessee contract, but it did involve also, to some extent, the Georgia contract,

and was, at least to a limited extent, incidental to the Georgia contract as well as to the Tennessee contract. It involved the settlement of a **wholly disputed account** in connection with the Georgia case and of **an entirely undisputed account in the Tennessee case.** At the time of the first suit, this payment had not been allocated by Southern, the payor, nor by Pickard, the beneficiary of the payment, nor by Atlas Supply Company, the recipient of the payment, to either of the jobs. It was immaterial to any party that the item be allocated to one job or the other, until Pickard separated his suits and sued separately on the Tennessee contract.

When this occurred, **Southern undertook to claim credit for the payment on the Tennessee contract in the Tennessee case.** The Georgia case was tried first, and **neither party credited or claimed the payment in that trial.** The District Court, in the present case, held that credit should be allowed in Tennessee for the payment, since the payment arose almost entirely out of the Tennessee contract, pertained if at all, only very slightly to the Georgia contract, and had not been litigated in the Georgia case.

The Court of Appeals for the Sixth Circuit reversed this holding, and held that the item in question should have been claimed by Southern in the Georgia case, and could not be claimed in the Tennessee case, although the Court of Appeals found the facts to be as above stated, and found that the payment had been made to satisfy an undisputed account in connection with the Tennessee contract. The Court of Appeals practically conceded that its decision worked an "inequitable hardship" upon Southern, and that it was based on "a technical question of procedure", but the Court held that this item was a "compulsory counterclaim" in the Georgia case under Rule 13 (a) and that since the Georgia suit was filed first, Southern had to plead the payment there.

The Court entirely overlooked the fact that **the defendant Southern was later faced with a separate suit embracing only the Tennessee contract**, and seemed to feel that this consideration was unimportant. It also disregarded the power of a court to allocate previously unallocated payments upon basic principles of equity and justice.

The primary question presented is, therefore, whether or not under Rule 13 (a) a defendant who is sued in **two different courts** at **two different times**, on **two separate contracts**, may plead his payments and credits on the two contracts according to the factual basis underlying the payments, or whether on a "technical question of procedure" he is compelled to claim credit for his payments in the first suit in which he has to plead, regardless of the factual basis underlying his payments.

FEDERAL RULES INVOLVED.

Involved here is Rule 13 (a) of the Federal Rules of Civil Procedure which provides as follows:

> "(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

Rule 13 (b) provides as follows:

> "(b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence

that is the subject matter of the opposing party's claim."

Also involved is Rule 1 of the Federal Rules of Civil Procedure which provides as follows:

> "**Scope of Rules.** These rules shall govern the procedure in the United States district courts and all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. **They shall be construed to secure the just, speedy and inexpensive determination of every action.**"

Further involved is Rule 8 (c) which provides as follows:

> "**Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively . . . payment . . . and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, **the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.**"

STATEMENT.

These suits arose under the provisions of the Miller Act, 40 U. S. C. 270 (b). The facts are entirely undisputed, as the case now comes before this Court, and were found in detail by the United States District Court in its decision of the case. The findings of fact of the District Judge were not disturbed by the Court of Appeals for the Sixth Circuit, and the opinion of that court restates the facts in language almost identical to that contained in the findings and conclusions of the District Judge.*

Southern Construction Company was the prime contractor on a project for the rehabilitation of certain barracks

* References herein are to the page numbers of the printed Appendices filed below. Page numbers in the appendix of Appellant below are followed by "a"; those of Appellees below are followed by "b".

at Fort Campbell, Tennessee. It was bonded by Continental Casualty Company. On May 5, 1955, Pickard entered into a subcontract with Southern to do the plumbing and heating required in the specifications of the prime contract for the sum of $50,000 (45b-46b).

Under the terms of this agreement Pickard was to furnish all labor and materials and was to do the plumbing and heating in accordance with the plans and specifications of the contract. He was required to furnish to Southern a performance bond guaranteeing faithful performance by him and payment for his labor and materials. Upon breach of the contract by Pickard, Article XIII of the contract authorized Southern to complete the work at Pickard's expense and to terminate Pickard's employment, take possession of the premises and hold Pickard liable for any costs in excess of the contract price (8b).

Work began on the subcontract by Pickard in May or June, 1955, and continued until December 16, 1955, at which time Pickard left the job without notice (46b).

Pickard was unable to furnish the required performance bond on the project and remained unbonded throughout the course of the work (1d).

Simultaneously with the performance of the work at Fort Campbell, Tennessee, Pickard was performing similar work on much larger subcontracts which he held with Southern Construction Company for rehabilitation of barracks at Fort Benning, Georgia. **Pickard's primary supplier for both the Fort Campbell project and the Fort Benning project was the Atlas Supply Company of Atlanta, Georgia** (46b).

On October 7, 1955, there was executed a supplemental agreement between Pickard and Southern which recited that Pickard held three subcontracts with Southern at Fort Benning and one subcontract for work at Fort Campbell; that Pickard had been unable to obtain performance

bonds on these various jobs; that Southern had been holding certain funds due him in lieu of said bonds; and that Pickard was in need of funds with which to complete the jobs and to pay other bills. Under this agreement Southern waived the provision requiring performance bonds, and Pickard waived all claims against Southern as a result of the withholding of any funds due Pickard in lieu of bond. Pickard further authorized Southern to withhold all other and further payments on work completed or to be completed during the course of the jobs until the completion of each job by Pickard and the final acceptance and payments thereof by the Army to Southern, excepting payments therein agreed to be made, "plus additional payments which will be made by Southern either jointly to Pickard and to subcontractors or material men, or to Pickard, as Southern is paid on requisitions which include labor and/or materials furnished by such subcontractors and/or material men" (47b-48b).

On December 16, 1955, Pickard's men left the job at Fort Campbell, Tennessee and were never heard from again. No notice of any sort was given by Pickard or any representative on his behalf of the withdrawal, the purpose thereof, or the reasons therefor (49b). At the time when Pickard withdrew from the Fort Campbell project, the work required there under his subcontract was from 96% to 98% completed (50b). Southern completed the work at Fort Campbell and obtained final settlement from the United States Government in April, 1956 (50b).

Shortly after Pickard left the work at Fort Campbell he also left the Fort Benning project (51b).

On October 7, 1955, when the supplemental agreement was executed, and at all times thereafter Pickard owed an unpaid balance in the amount of $34,520 to Atlas Supply Company for materials furnished to Pickard by Atlas at Fort Campbell (48b).

In addition to this amount, Atlas Supply Company was claiming a balance due it from Pickard in the sum of $104,000 on the Fort Benning job (51b). **Southern did not dispute the amount of the Atlas account at Fort Campbell. However, it disputed the Fort Benning Claim of Atlas in its entirety** (51b; 81b).

In August, 1956, a conference was had between Southern officials and representatives of the Atlas Supply Company. As a result of this conference Southern paid to Atlas Supply Company, in August, 1956, the sum of $35,000 and obtained from Atlas a complete release of its liability under the Miller Act on Pickard's accounts, both at Fort Benning, Georgia, and at Fort Campbell, Tennessee (51b; 38a-39a).

At the time when this payment was made by Southern to Atlas, Atlas had consolidated its accounts against Pickard and was carrying them as one consolidated account. Atlas credited the $35,000 payment against this single account, so that **Pickard received full credit for this payment on his indebtedness to Atlas.** Neither Southern nor Atlas at the time of this payment specifically undertook to allocate the $35,000 payment, or any part thereof, to one project or the other (52b).

Pickard gave no credit to Southern for this payment on either job, and his books did not reflect the payment. There is no evidence that Pickard knew of the payment in August, 1956, but in April, 1957, his attorneys were advised by the attorney for Southern that the payment had been made, and that the same had not been allocated by Southern either to the Fort Benning or the Fort Campbell project (52b).

In December, 1956, Pickard filed suit in the District Court for the Middle District of Georgia against Southern and the Continental Casualty Company on **both the Fort**

Benning contract and the Fort Campbell project (52b; 40a-44a). Southern filed an answer and counterclaim in which it alleged that it had paid to Pickard sums in excess of the total contract price on each job and sought judgment for such excess. Included in the counterclaim at this time was the $35,000 payment made in August, 1956, to Atlas (46a-47a; 53b).

In April, 1957, however, Pickard filed the present action in the United States District Court for the Middle District of Tennessee on **the Fort Campbell project only** (19b-22b). The Fort Campbell phase of Pickard's claim was subsequently eliminated from the Georgia proceedings and was not litigated in the Georgia case (51a-52a). Pickard's reason for filing the separate suit in Tennessee was that the Miller Act itself requires that every suit brought under its provisions "shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . . ." 40 U. S. C. 270b (b). The question of jurisdiction had not been raised by Southern or Continental Casualty in the Georgia proceedings.

The Georgia case was tried first, in March, 1959. In the trial of that case Pickard introduced certain sworn exhibits in which he purported to list all of the payments made by Southern to him or on his behalf at Fort Benning and to give credit for the same. He **did not include this $35,000 payment made by Atlas to Southern in August, 1956**, although his counsel had a copy of the check and the release from Atlas in their possession at the time of the Georgia trial (53b).

Southern listed on exhibits filed by it in that case the payments made by it to Pickard or on his behalf on the Fort Benning job, for which Southern claimed credit. **The $35,000 payment made to Atlas was not claimed in these**

exhibits. The District Judge found as a fact in the present case that the $35,000 payment to Atlas in August, 1956, **was not submitted to or considered by the jury in the trial of the Fort Benning case.** He further found as a fact that **this item had not been litigated or adjudged by the District Court in Georgia,** and that **credit for it was neither given by Pickard nor claimed by Southern in the previous proceedings between the parties in the Georgia Court** (53b). The Court of Appeals for the Sixth Circuit did not disturb these findings.

The District Judge stated in his findings of fact that although the $35,000 payment was included in the original counterclaim filed by Southern in the Fort Benning case, it was, prior to the trial in that case, eliminated by Southern from its counterclaim, that it was included by Southern as part of its counterclaim and defense in the present suit, and that Southern claimed credit for $34,520 thereof toward the contract price of the Fort Campbell project (53b-54b). The **District Judge allowed the credit claimed in the Tennessee case** (62b-67b), but as previously stated, the Court of Appeals for the Sixth Circuit reversed this holding and held that under Rule 13 (a) of the Federal Rules of Civil Procedure Southern was **compelled** to claim the $35,000 **in its entirety** in the Georgia case.

As stated, the Court of Appeals for the Sixth Circuit reached this result in spite of the equities and justice of the case, indicating that it might have reached a different result "if there had been an allocation of the $35,000 payment between the indebtedness to Atlas Supply Company at Fort Benning and the indebtedness at Fort Campbell." The Court entirely overlooked the basic principles of law governing the power of any court to allocate payments between disputed and undisputed accounts, or to allocate payments according to basic principles of equity and justice. See **U. S. for use of Carroll v. Beck,** 151 F. 2d 964 (6 Cir., 1945); **Bain-Nicodemus, Inc. v. Bethay,** 40 Tenn.

App. 487, 292 S. W. 2d 234 (1953); 40 Am. Jur., **Payment**, § 129.

The Court of Appeals for the Sixth Circuit reached its decision by a very technical construction of Rule 13 (a). It held that the $35,000 payment was "a potential compulsory counterclaim" in either of the two suits which Pickard had filed, and that its "compulsory status" matured in the suit "**in which and at the time when Southern first filed a responsive pleading**". It entirely overlooked the fact that Pickard himself had made an error of procedure and had embraced the Tennessee contract in the Georgia suit, **so that at the time when Southern first had to file a responsive pleading, both contracts were embraced in the Georgia case.** The holding indicates that the plaintiff may at his discretion delete part of his initial suit, file it elsewhere, and **thereby deprive the defendant of the right to defend the second suit on its facts**, because of the existence of Rule 13 (a). None of the cases cited by the court presented fact situations even closely similar to the present case.

We respectfully submit that Rule 13 (a) was never intended to accomplish an inequitable result such as was reached in the present case, and that the facts of the present case do not fall within Rule 13 (a). The **basic purpose and spirit of Rule 13 (a) was to prevent multiplicity of litigation. The defendants and petitioners in the present case have in no sense violated the purpose of that Rule. They have not initiated any suit at any time**, but **have simply sought to defend two separate suits upon the basic facts pertaining to each.**

The item of $35,000 is not in a true sense a "counterclaim" but actually constitutes a payment, and is a matter of defense. Southern undertook, because of the undisputed underlying facts, to allocate $34,520 of the payment to the Tennessee case, and the District Judge held that it

had this right, and that Pickard could not possibly be prejudiced by the proposed allocation, since he received full benefit of the payment and had not himself undertaken to allocate or give credit for it in either of the two suits which he had brought. The holding of the Court of Appeals for the Sixth Circuit compels Southern to undertake to reopen the Georgia case and to claim the entire item in that case, despite the fact that Southern did not recognize any liability to Atlas on the Georgia contract, and disputed Pickard's account with Atlas in Georgia in its entirety, while recognizing the validity of Pickard's indebtedness to Atlas in Tennessee to the extent of $34,520.

REASONS FOR GRANTING THE WRIT.

This is a case of first impression. We have found no reported case which deals with the problem here presented. The undisputed facts show that the case does not fall within the literal terms of Rule 13 (a), and that only by a forced, harsh and inequitable construction of Rule 13 (a) has the Court of Appeals for the Sixth Circuit reached its decision. That Court ignored the basic equity and justice of the position of the petitioners; has ignored the basic meaning and purpose of the Federal Rules of Civil Procedure; and has evolved a new concept, that of a "potential compulsory counterclaim in either of . . . two suits", while at the same time ignoring the fact that under its holding the defendants were never afforded an opportunity to assert the item in question in the Tennessee suit.

Actually Rule 13 (a) does not, by its terms, embrace a situation where there are two separate pending actions by the same plaintiff against the same defendants. This is a fact situation which may be unusual, but it is clearly presented in the present case. In order correctly to apply Rule 13 (a) in any situation, the purpose and underlying reason for the rule must be examined, and when this is

done, it is clear that Rule 13 (a) was promulgated for the purpose of **preventing multiplicity of litigation** between parties having opposing claims against each other. It never was designed **to prevent a defendant from asserting his defenses** according to the facts underlying them where there are two separate and distinct transactions between the parties which are the subject matter of two separate and distinct suits.

Such was the situation presented here. Southern was first sued in Georgia by Pickard on both contracts. As long as the suit remained thus, there was no reason for Southern to try to allocate the $35,000 payment between either of the two jobs, since its defenses and counterclaims on both contracts could be asserted the one suit. **We concede that as long as the case remained in this posture, Southern could not itself have "split off" part of its defenses or counterclaims and filed a separate suit against Pickard in another jurisdiction.** This was the type of procedure disapproved in **United States v. Eastport Steamship Corporation**, 255 F. 2d 795 (2d Cir. 1958). **When, however, Pickard himself deleted part of his claim and brought a separate suit thereon in Tennessee, we submit that basic fairness and justice dictate that the defendant to the second action be permitted to frame his defenses according to the factual basis upon which his payments were made.** Under the undisputed facts in this case, the $35,000 payment made by Southern to Atlas in August 1956 pertained to a wholly undisputed account of $34,520 arising out of the Fort Campbell contract, and to settlement of a wholly disputed claim of Atlas against Southern and Pickard at Fort Benning. Southern did not concede the Fort Benning account to be valid in the least, and disputed in its entirety the Atlas claim that Pickard was indebted to it at Fort Benning.

Southern, of course, under the Miller Act was secondarily liable to all suppliers of Pickard on either job.

The fact that Southern must have been correct in its position that the Fort Benning account was entirely inaccurate is plainly borne out by the fact that Atlas gave Southern a complete release on both jobs for the sum of $35,000. Southern was a bonded and reputable contractor, and there was no possible reason for Atlas so drastically to reduce its claims unless Southern's position were entirely correct. Pickard, of course, was shown by the evidence to be unable to provide a bond, and was an insolvent subcontractor. By settling with Southern, Atlas gave up any practical hope of recovering on its accounts with Pickard, and in releasing Southern and Continental Casualty, it released the only sources from which it might have any real hope of collection.

We recognize the words "transaction or occurrence" found in Rule 13 (a) are given a broad and liberal interpretation. There can be no quarrel with this, when viewed in the light of the purpose of Rule 13 (a) to prevent multiplicity of litigation. **The decided cases deal with fact situations where a defendant has a potential counterclaim against the plaintiff, and undertakes himself to initiate new litigation against the plaintiff in a different court or in a different suit.** It was this type of procedure which Rule 13 (a) was designed to prevent. The Rule has no application, however, to the situation now presented.

The District Judge, we submit, correctly analyzed the situation when he said that Southern was faced with a situation where the item of $35,000, if it fell within Rule 13 at all, could well have been compulsory in either case if the two suits had been filed simultaneously and separately. It certainly pertained, almost in its entirety, to the Tennessee "transaction or occurrence." It pertained, if at all, only very slightly and incidentally to the Georgia "transaction or occurrence." It certainly would be inequitable, unjust and unfair to require the defendant to

assert the item in the Georgia case **without ever having a chance to assert it in the Tennessee case.** The District Judge held, of course, that if Southern had undertaken to litigate the item in the Georgia case, it could not do so in Tennessee. Where, however, neither Southern nor Pickard recognized the item in the Georgia case as it finally went to trial and where credit was neither given nor claimed for it there, the District Judge held that the claim could be asserted in the Tennessee case. We submit that this holding was imminently correct, and that the holding of the Court of Appeals to the contrary is based upon a strained, abstruse and incorrect interpretation of Rule 13 (a).

Actually in the last analysis, this item was simply one of "payment", and was a **defense** asserted by Southern against Pickard. It did, of course, comprise part of a "counterclaim" in the sense that Southern claimed it had paid more to Pickard on his behalf than the contract price. Southern, however, has waived any affirmative relief against Pickard in the Tennessee case, and has and is claiming credit for this payment only as a part of its defense to Pickard's suit. When further consideration is given to the fact that Pickard himself cannot possibly be prejudiced by the proposed allocation of the payment, inasmuch as he himself did not recognize the validity of the payment in the Georgia proceeding, and did not insist that it be allocated there, and when it is further considered that Southern can be exposed to a substantial judgment in favor of an unbonded, insolvent subcontractor in Tennessee if the proposed credit is denied, the basic inequity and injustice of the decision of the Court of Appeals for the Sixth Circuit become apparent. The Federal Rules of Civil Procedure should not be given an interpretation so as to sanction so serious a miscarriage of justice, where such an interpretation is neither compelled nor desirable.

CONCLUSION.

Our failure to discuss in detail the reported cases in this petition is not inadvertent. As stated, we have found no case which deals with a fact situation or a procedural situation similar to the one in question. We realize that in considering a petition for a writ of certiorari this Court is not, as a general rule, concerned primarily with whether the decision below is correct or incorrect, but we do understand that the Court is deeply concerned with the proper interpretation and application of its own rules of civil procedure. When these rules have been used for the purpose of defeating justice, rather than of promoting a speedy, just and inexpensive determination of litigation, then we submit that a case is presented where this Court should exercise its powers. We earnestly request the Court to grant the petition of certiorari, to revise the judgment of the Court of Appeals for the Sixth Circuit insofar as the same pertains to the compulsory counterclaim feature of the case, and to reinstate the judgment of the District Court in this cause.

Respectfully submitted,

CHARLES C. TRABUE, JR.,
Nashville, Tennessee,
Attorney for Petitioners.

Of Counsel:

TRABUE, MINICK, STURDIVANT & HARBISON,
26th Floor, Life and Casualty Tower,
Nashville 3, Tennessee,

HULL, WILLINGHAM, TOWILL & NORMAN,
Southern Finance Building,
Augusta, Georgia,

HARRY S. McCOWEN,
2634 Bank of Georgia Building,
Atlanta, Georgia.

OPINION.

(Filed Aug. 3, 1961, Carl W. Reuss, Clerk.)

No. 14,239.

United States Court of Appeals
For the Sixth Circuit.

United States for Use of Samuel J. Pickard, d/b/a Pickard Engineering Company, Plaintiff-Appellant, v. Southern Construction Co., Inc., and Continental Casualty Company, Defendants-Appellees.	Appeal from the United States District Court for the Middle District of Tennessee.

Decided August 3, 1961.

Before: Miller, Chief Judge, Cecil, Circuit Judge, and Boyd, District Judge.

Miller, Chief Judge. This action was filed under the provisions of the Miller Act, Section 270b, Title 40, United States Code, in the name of the United States of America for the use of Samuel J. Pickard doing business as Pickard Engineering Company, against the appellees, Southern Construction Company, Inc., hereinafter called Southern, and Continental Casualty Company, surety on its pe

formance bond, to recover on a construction contract alleged by Pickard to have been breached by Southern.

Southern Construction Company was the prime contractor on a project for the rehabilitation of certain barracks at Fort Campbell, Tennessee. On May 5, 1955, Pickard entered into a subcontract with Southern to do all the plumbing and heating required in the specifications of the prime contract at the contract price of $50,000.00. The complaint alleged that under the subcontract Southern failed to make the required progress payments to Pickard as the work progressed; that without justification it withheld funds from the plaintiff for long periods of time, rendering it impossible for plaintiff to meet its payment obligations to its suppliers, labor and materialmen; that despite the failure of Southern to abide by the contract, plaintiff prosecuted the work to substantial completion but received from Southern only one progress payment in the amount of $13,000.00. Plaintiff sued for the specified contract price of $50,000.00 less this payment of $13,000.00.

Under the subcontract Pickard was required to furnish a performance bond to Southern in the amount of $50,000.00, guaranteeing faithful performance of the subcontract. Pickard was unable to furnish the required performance bond on this project, and remained unbonded throughout the course of this work. Work began on the contract by Pickard in May or June 1955 and continued until December 16, 1955.

Simultaneously with the performance of the work at Fort Campbell, Tennessee, Pickard was performing similar work on much larger subcontracts which he held with Southern for rehabilitation of barracks at Fort Benning, Georgia. Pickard's primary supplier for both the Fort Campbell project and the Fort Benning project was the Atlas Supply Company.

On October 7, 1955, there was executed a supplemental agreement between Pickard and Southern, which recited that Pickard held three subcontracts with Southern at Fort Benning and one subcontract for work at Fort Campbell; that Pickard had been unable to obtain performance bonds on the various jobs; that Southern had been holding certain funds due him in lieu of said bonds; and that Pickard was in need of funds with which to complete the jobs and to pay other bills. Under this agreement Southern waived the provision requiring payment for performance bonds and Pickard waived all claims against Southern as a result of the withholding of any funds due Pickard on requisition in lieu of bond. Pickard further authorized Southern to withhold all other and further payments on work completed or to be completed during the course of said jobs, until the completion of each job by Pickard and the final acceptance and payment thereof by the Army to Southern, excepting payments therein agreed to be made, "plus additional payments which will be made by Southern either jointly to Pickard and to subcontractors or materialmen, or to Pickard, as Southern is paid on requisitions which include labor and or material furnished by such subcontractors and/or materialmen."

After October 7, 1955, and prior to December 16, 1955, when Pickard withdrew from the job, Southern received from the Government two payments, one on October 17, 1955, in the amount of $12,002.46 and one on November 4, 1955, in the amount of $15,512.95. Southern failed to pay appellant or his suppliers or materialmen as it received these payments from the Government, as required by the contract.

On December 16, 1955, Pickard's men left the job at Fort Campbell, Tennessee, and were never heard from again. No notice of any sort was given by Pickard, his foremen

or any representative on his behalf of the withdrawal, the purpose thereof, or the reasons therefor. At the time when Pickard withdrew from the Fort Campbell project, the work required there under his subcontract was from 96% to 98% completed. Southern completed the work at Fort Campbell and obtained final settlement from the United States Government in April 1956.

Shortly after Pickard left the work at Fort Campbell he also left the Fort Benning project.

On October 7, 1955, when the supplemental agreement was executed, and continuously thereafter to the time when Pickard left the Fort Campbell job there was an unpaid balance in the amount of $34,520.00 on the account to the Atlas Supply Company for materials furnished by Atlas at Fort Campbell. In addition to this amount, Atlas Supply Company was claiming a balance due it from Pickard in the sum of $104,000.00 on the Fort Benning job. Southern did not dispute the amount of the Atlas account at Fort Campbell. However, it disputed the Fort Benning claim of Atlas in its entirety. In August 1956 a conference was had between Southern officials and representatives of the Atlas Supply Company, as a result of which Southern paid to Atlas Supply Company in August 1956 the sum of $35,000.00 and obtained from Atlas a complete release of all liability of Southern on Pickard's accounts, both at Fort Benning, Georgia, and Fort Campbell, Tennessee.

At the time when this payment was made by Southern to Atlas, Atlas had consolidated its accounts against Pickard, and was carrying them as one consolidated account. Atlas credited the $35,000.00 payment against this single account so that Pickard received full credit for this payment on his indebtedness to Atlas. Neither Southern nor Atlas at the time of this payment specifically undertook to allocate the $35,000.00 payment, or any part thereof, to

one project or the other. It was a single indivisible payment applicable to both projects.

Pickard gave no credit to Southern for this payment on either job, and his books did not reflect the payment. There is no evidence that Pickard knew of the payment in August 1956 at the time when it was made. In April 1957, however, Pickard's attorneys were advised by the attorney for Southern that this payment had been made, and that the same had not been allocated by Southern either to the Fort Campbell project or to the Fort Benning project.

In December 1956 Pickard filed suit in the District Court for the Middle District of Georgia against Southern and the Continental Casualty Company on both the Fort Benning contract and the Fort Campbell project. Southern filed an answer and counterclaim, in which it alleged that it had paid to Pickard sums in excess of the total contract between the parties and sought judgment for such excess. Included in the counterclaim at this time was the $35,000.00 payment hereinabove referred to.

In April 1957, however, Pickard filed the present action in the United States District Court for the Middle District of Tennessee on the Fort Campbell project only, and this part of Pickard's claim was subsequently eliminated by amendment from the action pending in the District Court in Georgia. The action in the District Court in Tennessee was filed for "jurisdictional" reasons, in that the Miller Act provides that every suit instituted under its provisions "shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere. . . ." **Section 270b (b), Title 40, United States Code.**

In the trial of the Fort Benning case in Georgia in March 1959, Pickard introduced certain exhibits in which

he purported to list all of the payments made by Southern to him or on his behalf at Fort Benning, and to give credit for the same. He did not include the $35,000.00 payment made to Atlas by Southern in August 1956. Southern listed on exhibits filed in that case the payments made by it to Pickard or on his behalf on the Fort Benning job, for which Southern claimed credit. The $35,000.00 payment made to Atlas was not claimed in these exhibits. The District Judge stated that the record in the Georgia case showed that the $35,000.00 payment to Atlas was not submitted to nor considered by the jury in the trial of the Fort Benning case. He found as a fact that this fund had not been litigated or adjudged by the District Court in Georgia, and that credit for it was neither given by Pickard nor claimed by Southern in the previous proceedings between the parties in that court. The District Judge stated in his findings of fact that although the $35,000.00 was included in the original counterclaim filed by Southern in the Fort Benning case, it was prior to the trial in that case, "dropped" from Southern's counterclaim in that case, has been included by Southern as part of its counterclaim and defense in the present case, and that Southern claims credit for $34,520.00 thereof toward the contract price of the Fort Campbell project. We are unable to tell from the record before us whether the original counterclaim in the Georgia suit was amended after the Tennessee suit was filed so as to withdraw this claim from the pleadings, or if it was "dropped" merely by the action of the parties in not presenting it in the trial of that case [compare Rule 15 (b), Rules of Civil Procedure], or if it was removed from the case by pretrial procedure under Rule 16, Rules of Civil Procedure. For the reason hereinafter stated, we believe it is immaterial.

Appellant's original complaint in this action filed on April 4, 1957, sought recovery in the amount of $37,000.00

under the contract of May 5, 1955, covering the Fort Campbell job. On June 17, 1959, appellant moved to amend the complaint, and on July 31, 1959, filed an amended complaint seeking to recover $100,310.08 on a quantum meruit basis for the reasonable value of labor, materials and services furnished by him to Southern on the Fort Campbell job.

The amended complaint alleged that, except for a few minor details, appellant completed its contract work; that it became impossible to complete these details because of virtual abandonment of the prime contract work by Southern; and that such action on the part of Southern, together with its failure to make the required payments for the work as it progressed, constituted breaches of the contract by Southern entitling appellant to relief on a quantum meruit basis.

Southern filed an amended answer and counterclaim denying certain material allegations of the amended complaint, and alleging affirmatively that appellant defaulted in the performance of the contract, by reason of which Southern was required to complete the work under the Fort Campbell contract, and that it had paid to the appellant or for his account in order to complete said contract the sum of $57,412.27, which was in excess of the contract price of $50,000.00. It sought judgment against appellant in the amount of $7,412.27.

The jury did not return a general verdict, but answered certain factual questions submitted to it. Three of these questions, which we thing material in our present consideration of the case, are as follows:

> 1. Did defendant, Southern Construction Co., Inc., by so conducting its own operations, interfere with the plaintiff Pickard in the performance of his work?
>
> Answer: (No)

2. Did defendant, Southern Construction Co., Inc., fail to pay plaintiff Pickard or the suppliers or materialmen of Pickard as it received payments from the Government for work performed by Pickard?

Answer: (Yes)

3. If you answer either question 1 or 2 Yes, was Plaintiff Pickard induced to leave the work, either by defendant's interfering with his work or by its failure to make payments required by the contract?

Answer: (Yes)

The District Judge held that appellant was not entitled to recover in quantum meruit and any recovery in its favor must be limited to the contract price.

The District Judge also ruled that Southern was entitled to use as a counterclaim in this action the $35,000.00 payment which it made to the Atlas Supply Company in August 1956, thus rejecting appellant's contention that under Rule 13 (a), Rules of Civil Procedure, it was a compulsory counterclaim in the suit filed first in Georgia, by reason of which it was barred from being used as a counterclaim in the present action.

Applying these two rulings to the facts of the case, the District Judge held that the $35,000.00 credit, together with the other payments admittedly made by Southern on the contract, made a total in excess of the contract price expended by Southern, and since Southern in open court waived any affirmative relief on its counterclaim, judgment was entered dismissing the action and denying any relief on the counterclaim. On this appeal, appellant challenges both of the rulings.

Right of Recovery in Quantum Meruit.

Appellant relies upon the well settled rule that under certain conditions a material breach of contract by one of the parties thereto confers upon the other party to the contract the right to rescind and abandon the contract and to recover in quantum meruit for the reasonable value of services and materials furnished. In a building or construction contract calling for the performing of labor and furnishing of materials covering a long period of time and involving large expenditures, a stipulation for payments on account to be made from time to time during the progress of the work must be deemed so material that a substantial failure to pay would justify the contractor in declining to proceed. Under such circumstances the contractor cannot be expected to finance the operation to completion without receiving the stipulated payments on account as the work progresses. **Guerini Stone Co. v. Carlin Construction Co.**, 248 U. S. 334, 344-345; **Pickens County v. National Surety Co.**, 13 F. (2) 758, 761, C. A. 4th; **United States v. Zara Contracting Co.**, 146 F. (2) 606, 610, C. A. 2nd; **United States v. Americo Construction Co.**, 168 F. Supp. 760, 761, D. C. Mass.; **Restatement, Contracts, Section 347.**

The District Judge recognized this rule but correctly pointed out that in order for the rule to be applicable the breach relied upon must be a breach which is so substantial and fundamental as to go to the very root of the contract. **Knutson v. Metallic Slab Form Co.**, 128 F. (2) 408, 411, C. A. 5th; **Pasquel v. Owen**, 186 F. (2) 263, 270, C. A. 8th; **Chamberlin v. Booth & McLeroy**, 135 Ga. 719, 70 S. E. 569, 35 L. R. A. N. S. 1223; **Brady v. Oliver**, 125 Tenn. 595, 614, 147 S. W. 1135; **Restatement, Contracts, Section 347, Comment (e).**

The District Judge ruled that appellant's contention that it became impossible to fully perform the contract on his

part because of the virtual abandonment of the prime contract by Southern was answered by finding No. 1 of the jury that Southern did not interfere with appellant in the performance of his work. Finding No. 2 of the jury recognized the fact that Southern did not make payments to appellant as if received payment from the Government, as required by the contract. Finding No. 3 upheld appellant's contention that he was induced to leave the job because of this failure to make progress payments. However, the District Judge was of the opinion that these findings did not answer the ultimate question presented, namely, whether the failure to make the payments was such a fundamental breach of the contract as to justify appellant in abandoning the contract and seeking recovery in quantum meruit instead. He was of the opinion that under the particular circumstances of this case, it was not such a breach. He pointed out that the supplemental agreement of October 7, 1955, was entered into because appellant was unable to furnish the bond required by the original contract, making it necessary for Southern to protect itself against the claims of materialmen and suppliers of appellant; that the supplemental agreement gave Southern the option to make payments to appellant and materialmen jointly which would furnish such protection; that if the payments had been made jointly to appellant and the materialmen when received by Southern from the Government, appellant would nevertheless not have received any money; and that, accordingly, Southern's failure to make payment to the materialmen as payment was received from the Government did not interfere with appellant's performance of the contract unless a supplier refused to furnish appellant with the necessary materials because of the failure to receive payments. The evidence not only failed to show any such refusal on the part of a supplier, but, on the contrary, showed that the suppliers cooperated in furnishing what appellant needed to complete the job. The

breach of an agreement which causes no loss to the plaintiff will not sustain a suit for rescission. **Block v. City of West Palm Beach**, 142 F. (2) 949, 952, C. A. 5th; **Pasquel v. Owen**, supra, 186 F. (2) 263, 270, C. A. 8th. We agree with the ruling of the District Judge. **Knutson v. Metallic Slab Form Co.**, supra, 128 F. (2) 408, 411, C. A. 5th.

Compulsory Counterclaim.

Appellant contends that the District Judge was in error in permitting Southern to include in its counterclaim in this case the $35,000.00 payment made to the Atlas Supply Company in August 1956, in that under Rule 13 (a), Rules of Civil Procedure, this payment was a compulsory counterclaim which should have been filed and litigated in appellant's action against it in the District Court in Georgia, and therefore could not be used in this action.

Rule 13 (a) provides as follows:

> "(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

Although Rule 13 (a) does not expressly provide that failure to assert a compulsory counterclaim in a prior suit will bar its assertion in a later suit, such is the effect of the rule. The principle of res judicata applies to all such claims which should have been raised, even though actually omitted. **Moore's Federal Practice, Vol. 3, Sec. 13.12;**

United States v. Eastport Steamship Corp., 255 F. (2) 795, 805, C. A. 2nd; **Hancock Oil Co. v. Universal Oil Products Co.**, 115 F. (2) 45, 47, C. A. 9th; **Pennsylvania R. Co. v. Musante-Phillips, Inc.**, 42 F. Supp. 340, 341, N. D. Cal.; **Gallahar v. George A. Rheman Co.**, 50 F. Supp. 655, 661, S. D. Georgia.

We are of the opinion that this payment arose "out of the transaction" which was the subject matter of the suit filed in the District Court in Georgia, within the meaning of the rule. "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." **Moore v. N. Y. Cotton Exchange**, 270 U. S. 593, 609-610. The test generally applied in determining whether a counterclaim is compulsory is whether there is a logical relationship between the claim and counterclaim. Only claims that are unrelated, or are related but within the exceptions stated in the rule, need not be pleaded. **Moore's Federal Practice, Vol. 3, Sec. 13.13; United Artists Corp. v. Masterpiece Productions, Inc.**, 221 F. (2) 213, 216, C. A. 2nd; **United States v. Eastport Steamship Corp.**, supra, 255 F. (2) 795, 805, C. A. 2nd; **Arvey Corp. v. Peterson**, 178 F. Supp. 132, 138, E. D. Pa.

The $35,000.00 payment to the Atlas Supply Company was a payment on an indebtedness of appellant to Atlas Supply Company arising out of both the Fort Benning contract and the Fort Campbell contract. No part of it was apportioned to either job. The indebtedness had been consolidated into a single account. The payment extinguished all the indebtedness of the appellant to Atlas Supply Company arising out of both projects and entitled Southern to a credit of $35,000.00 against any claim that appellant might make under either of the two contracts. In our opinion, it was a compulsory counterclaim to be

asserted by appellant at the time it filed its first answer and counterclaim in the suit in the District Court in Georgia.

The District Judge, in permitting the claim to be included in the counterclaim in the Tennessee suit, was of the opinion that the claim arose out of both projects; that Southern was required to use it as compulsory counterclaim when it filed its answer in the Georgia suit; that when appellant separated his claims and filed the second suit in Tennessee, Rule 13 (a) required Southern also to plead the same claim in the suit in Tennessee in that it also grew out of the transaction which constituted the subject matter of the Tennessee suit; that if the claim had been adjudicated in the Georgia suit, it could not be litigated a second time in the Tennessee suit; that the claim was not adjudicated in the Georgia suit; and since Southern was required by Rule 13 (a) to plead it in the Tennessee suit and it had not been adjudicated in the Georgia suit, the District Court in the Tennessee suit had jurisdiction to hear and adjudicate the claim.

The District Judge also expressed the opinion that when Southern filed its answer in the Tennessee suit, this claim was the subject of another pending action, namely, the suit in the District Court in Georgia; that by reason of the exception contained in Rule 13 (a), it was accordingly not a compulsory counterclaim in the Tennessee suit; but because it grew out of that transaction it was a permissive counterclaim in that suit and could be adjudicated in that suit if not previously adjudicated by the court in Georgia. The exception in Rule 13 (a) provides that if the claim is the subject matter of another pending action, such claim "need not be so stated" (emphasis added) in the defendant's answer. It was reasoned by the District Judge that this is an exception running in favor of the defendant, which, although not requiring a defendant to plead such

a claim, gives him an option to do so if he so desires. Reliance was placed upon the discussion of this question in **Moore's Federal Practice, Vol. 3, Section 13.14, page 38.** It will be noticed, however, that in the example there discussed, the prior pending action was filed in a state court and did not involve a compulsory counterclaim under Federal Rule 13 (a).

We believe the ruling of the District Judge misconstrues the rule. Rather than being a compulsory counterclaim in both suits, we consider the claim a potential compulsory counterclaim in either of the two suits, with its compulsory status maturing in the suit in which and at the time when Southern first filed a responsive pleading. Rule 13 (a) makes the counterclaim compulsory "at the time of serving the pleading." At the time when the answer was filed in the Georgia suit, the claim was not the subject of another pending action, and it was a compulsory counterclaim in that suit. If compulsory in that suit, it would not also be compulsory in a later suit. Nor should it be compulsory in one suit and at the same time be permissive in another suit pending between the same parties.

As pointed out above, the fact that it was not litigated in that suit, does not change its character as a compulsory counterclaim with the result that Southern is barred from subsequently asserting it in the present action. **United States v. Eastport Steamship Corp.**, supra, 255 F. (2) 795, 805, C. A. 2nd.

There might be merit in appellee's contention if there had been an allocation of the $35,000.00 payment between the indebtedness to Atlas Supply Company at Fort Benning and the indebtedness at Fort Campbell. But there was no allocation. In fact, at the time of the payment there was only one indebtedness, and so treated by the parties.

Appellant, in answer to the plea of inequitable hardship resulting from this ruling on a technical question of procedure, calls attention to the fact that final judgment has not yet been entered in the suit in the District Court in Georgia where the counterclaim should have been prosecuted. What effect our ruling in this case should have on that case, is not for us to say.

The rulings of the District Judge are affirmed in part and reversed in part.

The judgment of the District Court is vacated and the case remanded for further proceedings consistent with the views expressed herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 46

SOUTHERN CONSTRUCTION COMPANY, INC., and CONTINENTAL CASUALTY COMPANY, *Petitioners*

v.

UNITED STATES to the use of SAMUEL J. PICKARD, d/b/a PICKARD ENGINEERING COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

EDWARD GALLAGHER
500 Federal Bar Building
1815 H Street, Northwest
Washington 6, D. C.
Attorney for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT OF FACTS

This is essentially a contract proceeding involving a government contract for rehabilitation of certain barracks at Fort Benning, Georgia and Fort Campbell, Tennessee. Respondent subcontracted to do the mechanical work at both places for petitioner Southern Construction Company, which was the prime contractor with the government.

On the theory it had not been fully compensated plaintiff instituted proceedings under the Miller Act (Aug. 24, 1935, Ch. 642, 49 Stat. 793, Title 40, secs. 270(a)-270(d). against the prime contractor, and its surety, first on December 26, 1956, in the United States District Court for the Middle District of Georgia, and later on April 4, 1957, in the United States District Court for the Middle District of Tennessee. (App. Pgs. 7a and 40a)* The statute required the proceedings to be separate, as it provides suit must be instituted in the District where the work was performed, and "nowhere else."

The case in Georgia was tried first in March, 1959, before a Jury, and resulted in a general verdict for the plaintiff-respondent. Judgment was entered on March 18, 1959, and a motion for a judgment notwithstanding the verdict, or, in the alternative, for a new trial was filed by defendants. On March 31st of the following year the Georgia Court granted the motion N.O.V., and entered judgment for the defendants. As to the motion for a new trial, the Court at the same time said: "The Court makes no ruling at this time on the defendants' motion for a new trial on the main case nor on the defendants' motion for a new trial on the counterclaim. (App. Pg. 57a) The Georgia Court has recently granted petitioners motion for a new trial on its counterclaim.

The case in Tennessee was tried in Nashville, in October, 1959, and was tried before a jury, to which special questions were submitted, with the exception that the issue pertaining to the counterclaim, which is the subject of the petition herein, was tried exclusively before the Court, by agreement of counsel. The answers of the Jury were favorable to plaintiff-respondent (App. Pg. 12a). However, by allowing the use of a counterclaim which is the

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* References are to Appendix filed below by Respondent, such Appendix being now a part of the Record in this Court.

subject of the petition herein, the trial Court for all practical purposes nullified the verdict of the Jury.

Respondent appealed to the Circuit Court of Appeals for the Sixth Circuit which ruled that the counterclaim could not be recognized in this Tennessee proceeding, saying it was a compulsory counterclaim in the earlier Georgia proceeding. From this ruling petitioner seeks a writ of certiorari from this Court.

The facts concerning the counterclaim are these—first, so far as the pleadings in both cases are concerned: So far as the pleadings in the Georgia case are concerned, it can be said the item of $35,000 in question was included to the end.

Petitioners say they did not ultimately "claim" the item of $35,000 in Georgia case, solely because their attorney advised them not to do so, and their attorney testified to the same effect. (App. Pg. 29a)

The record shows that the suit was filed in Georgia on December 26, 1956, and in Tennessee on April 4, 1957. It was not until the pre-trial hearing shortly before trial, on June 17, 1959, that there emerged any clear-cut intention on the part of defendant-petitioner to segregate the $35,000 for the purpose of asserting it in the Tennessee case. As a result of the pre-trial hearing, the defendant then, just three months before the trial, amended its counterclaim with a computation based largely on the item of $35,000. (App. Pg. 11a)

The proof on this issue shows that there were three separate contracts between plaintiff and defendant at Fort Benning totaling $513,075.11. There was one contract at Fort Campbell, at a contract price of $50,000. The largest single supplier for plaintiff on both projects was Atlas Supply Company of Atlanta, Georgia. When plaintiff's work was terminated on both jobs, about January 1, 1957, Atlas was owed on both jobs a total amount of

$139,492.06, the figures being $104,971.12 for deliveries to the Benning job, and $34,520.94 to the Campbell job involved here. To discharge its own liability, but not the liability of plaintiff-respondent the defendant-petitioner on August 28, 1957, eight months after the work was terminated settled the entire account by a payment to Atlas of $35,000. (App. Pg. 39a)

It has been stipulated in this case that the creditor, Atlas Supply Company, carried this account on its books as one single, indivisible account at the time the $35,000 settlement payment involved here was made.

The evidence shows that the sum of $35,000 was paid in settlement of the total amount. It is so stated in the release that was delivered in return for the check, both of which comprise plaintiff's Exhibit No. 22. (App. Pg. 39a) Defendant-petitioner's principal witness stated in his testimony that there never was any attempt to apply, or allocate, or appropriate the entire amount to Fort Campbell. Concerning this he said that there was no "bookkeeping decision or an auditing decision or a company decision" to do so. (App. Pg. 26a) Counsel for defendants admit that there was no attempt to allocate the entire payment to Campbell. (App. Pg. 29a)

On the basis of the foregoing evidence, as well as other testimony and evidence of record, the trial Court made the following finding (App. Pg. 18a):

> The Fort Campbell and the Fort Benning projects constituted distinct and separate transactions between the same parties, Southern and Pickard; yet this payment of $35,000 unquestionably pertained to both. Thus it is a claim or payment which grows out of both transactions and is common to both. It therefore "arises out of" the transactions at both Fort Benning and Fort Campbell. It is very appropriately associated with both lawsuits, both causes of action. The payment was unallocated by anyone. It was not applied specifically to either job at the time of

payment. It was simply accepted and received as one indivisible, over all payment, constituting a complete release of any liability of Southern to Atlas growing out of both jobs.

The Circuit Court of Appeals for the Sixth Circuit found to the same effect when it ruled (Page 28 of the Petition) that, "We are of the opinion that this payment arose out of the transaction which was the subject matter of the suit filed in the District Court in Georgia, within the meaning of the rule."

ARGUMENT

The decision of the lower Court, and the briefs in this case, show that the rule involved here (Rule 13(a) Federal Rules of Civil Procedure) has been the subject of interpretation on many occasions by lower Courts, and indeed in an important case by this Court itself.

Rule 13(a) is simply a broadening of former Equity Rule 30, and the latter Equity Rule was carefully considered and construed by this Court in *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610, 46 S. Ct. 367, 371, 70 L. Ed. 750, 45 A. L. R. 1370. For decisions of other courts construing and interpreting Rule 13(a) *see Lesnik v. Public Industrial Corporation*, Cir. 2, 144 F(2) 968, 975; *Switzer Bros. v. Locklin*, Cir. 7, 207 F(2) 483, 488; *Cleveland v. Higgins*, Cir. 2, 148 F(2) 722, 724; *United States to the use of Foster Wheeler Corp. v. American Surety Company of New York*, Cir. 2, 142 F(2) 726; *Hancock Oil Co. v. Universal Oil Products Co.*, 9 Cir., 115 F(2) 45; 120 F(2) 959; *Home Ins. Co. of New York v. Trotter*, 8 Cir., 130 F(2) 800. See also *Moore's Federal Practice*, Vol. 3, Sec. 13.12 and 13.13.

This is simply another case in which the lower courts have applied the terms of the Rule. There is nothing new or different about this case except, possibly, some of the facts. Standing alone a new set of facts does not justify *certiorari*.

None of the usual grounds for granting a writ of certiorari are present here. For example, this is not a case where a State Court has decided a Federal question of substance not heretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court; nor is it a case where a Court of Appeals has rendered a decision in conflict wtih the decision of another Court of Appeals on the same matter. It is not a case where a Court of Appeals has decided an important question of Federal law which has not been previously considered and determined by this Court; nor is it a case where a Court of Appeals has decided a Federal question in a way that conflicts with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted

EDWARD GALLAGHER
500 Federal Bar Building
1815 H Street, Northwest
Washington 6, D. C.
Attorney for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. [redacted] 46

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR THE PETITIONERS.

CHARLES C. TRABUE, JR.,
Nashville 3, Tennessee,
Attorney for Petitioners.

Of Counsel:
TRABUE, MINICK, STURDIVANT & HARBISON,
26th Floor, Life & Casualty Tower,
Nashville 3, Tennessee,
HULL, WILLINGHAM, TOWILL & NORMAN,
Southern Finance Building,
Augusta, Georgia,
HARRY S. McCOWEN,
2634 Bank of Georgia Building,
Atlanta, Georgia.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the District Court for the Middle District of Tennessee is unreported, but appears in the record (R. 85-100). The opinion of the Court of Appeals for the Sixth Circuit (R. 170-182) is reported at 293 F. 2d 403.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 3, 1961 (R. 169), and petition for rehearing was denied on August 30, 1961 (R. 182). The petition for a writ of certiorari was filed on November 27, 1961 and was granted on January 22, 1962, 7 L. Ed. 2d 437. The jurisdiction of this Court rests upon 28 U. S. C., § 1254 (1).

FEDERAL RULES INVOLVED.

Involved here is Rule 13 (a) of the Federal Rules of Civil Procedure which provides as follows:

> "(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

Rule 13 (b) provides as follows:

> "(b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. Rules Civil Procedure, Rule 13.

Also involved is Rule 1 of the Federal Rules of Civil Procedure which provides as follows:

> "**Scope of Rules.** These rules shall govern the procedure in the United States district courts and all

suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. **They shall be construed to secure the just, speedy and inexpensive determination of every action.**" Fed. Rules Civil Procedure, Rule 1.

Further involved is Rule 8 (c) which provides as follows:

"**Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively . . . payment . . . and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, **the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.**" Fed. Rules Civil Procedure, Rule 8 (c).

QUESTION PRESENTED.

The sole question presented by this petition is one of the proper meaning and interpretation of Rule 13 (a) of the Federal Rules of Civil Procedure promulgated by this Court.

The facts of the case are undisputed. The petitioners, Southern Construction Company, Inc., and Continental Casualty Company, were sued by the original plaintiff, Pickard, in one action in the United States District Court for the Middle District of Georgia on four separate contracts under the Miller Act (40 U. S. C. 270 (b)). The suit alleged breach of one contract by Southern Construction Company at Fort Campbell, Tennessee, and three contracts at Fort Benning, Georgia, and sought one recovery for all claims of the plaintiff on all of the contracts. The defendants filed an answer and counterclaim embracing all of their payments and counterclaims on all four contracts.

Thereafter **the plaintiff**, Pickard, **filed a separate suit**, the present action, in the United States District Court for the Middle District of Tennessee, **suing on the Tennessee contract only**. The plaintiff did not formally delete the Tennessee contract from the Georgia case until a later time, but the plaintiff filed it separate suit in Tennessee for "jurisdictional" reasons under the Miller Act. After unsuccessfully seeking dismissal of this separate suit because of the pendency of the Georgia proceedings, the defendants filed an answer and counterclaim, setting up certain payments which they claimed to have been made on account of the plaintiff under the Tennessee contract.

One payment which had been made by the defendant Southern Construction Company on behalf of Pickard pertained almost entirely to the Tennessee contract, but it did involve also, to some extent, the Georgia contract, and was, at least to a limited extent, incidental to the Georgia contract as well as to the Tennessee contract. It involved the settlement of a **wholly disputed account** in connection with the Georgia case and of **an entirely undisputed account in the Tennessee case**. At the time of the first suit, this payment had not been allocated by Southern, the payor, nor by Pickard, the beneficiary of the payment, nor by Atlas Supply Company, the recipient of the payment, to either of the jobs. It was immaterial to any party that the item be allocated to one job or the other, until Pickard separated his suits and sued separately on the Tennessee contract.

When this occurred, **Southern undertook to claim credit for the payment on the Tennessee contract in the Tennessee case**. The Georgia case was tried first, and **neither party credited or claimed the payment in that trial**. The

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* Unless otherwise noted, emphasis has been supplied by the writer.

District Court, in the present case, held that credit should be allowed in Tennessee for the payment, since the payment arose almost entirely out of the Tennessee contract, pertained if at all, only slightly to the Georgia contract, and had not been litigated in the Georgia case.

The Court of Appeals for the Sixth Circuit reversed this holding, and held that the item in question should have been claimed by Southern in the Georgia case, and **could not** be claimed in the Tennessee case, although the Court of Appeals found the facts to be as above stated, and found that the payment had been made to satisfy an undisputed account in connection with the Tennessee contract. The Court of Appeals practically conceded that its decision worked an "inequitable hardship" upon Southern, and that it was based on "a technical question of procedure," but the Court held that this item was a "compulsory counterclaim" in the Georgia case under Rule 13 (a), and that since the Georgia suit was filed first, Southern had to plead the payment there.

The Court entirely overlooked the fact that **the defendant Southern was later faced with a separate suit embracing only the Tennessee contract.** It also disregarded the power of a court to allocate previously unallocated payments upon basic principles of equity and justice.

The primary question presented is, therefore, whether or not under Rule 13 (a) a defendant who is sued on **two separate contracts in two separate courts**, with **both actions pending at the same time**, may plead his payments and credits on the two contracts according to the factual basis underlying the payments or whether on a "technical question of procedure" he is compelled to claim credit for his payments in the first suit in which he has to plead, regardless of the factual basis underlying his payments.

STATEMENT.

These suits arose under the provisions of the Miller Act, 40 U. S. C. 270 (b). **The facts are entirely undisputed, as the case now comes before this Court, and were found in detail by the United States District Court in its decision of the case. The findings of fact of the District Judge were not disturbed by the Court of Appeals for the Sixth Circuit,** and the opinion of that court restates the facts in language almost identical to that contained in the findings and conclusions of the District Judge.

Southern Construction Company was the prime contractor on a project for the rehabilitation of certain barracks at Fort Campbell, Tennessee. It was bonded by Continental Casualty Company. On May 5, 1955, Pickard entered into a subcontract with Southern to do the plumbing and heating required in the specifications of the prime contract for the sum of $50,000 (R. 103, 170).

Under the terms of this agreement Pickard was to furnish all labor and materials and was to do the plumbing and heating in accordance with the plans and specifications of the contract. He was required to furnish to Southern a performance bond guaranteeing faithful performance by him and payment for his labor and materials. Upon breach of the contract by Pickard, Article XIII of the contract authorized Southern to complete the work at Pickard's expense and to terminate Pickard's employment, take possession of the premises and hold Pickard liable for any costs in excess of the contract price (Pl. Ex. 2; R. 71-72, 103).

Work began on the subcontract by Pickard in May or June, 1955, and continued until December 16, 1955, at which time Pickard left the job without notice (R. 103, 171-172).

Pickard was unable to furnish the required performance bond on the project and remained unbonded throughout the course of the work (R. 103, 171).

Simultaneously with the performance of the work at Fort Campbell, Tennessee, Pickard was performing similar work on much larger subcontracts which he held with Southern Construction Company for rehabilitation of barracks at Fort Benning, Georgia. **Pickard's primary supplier for both the Fort Campbell project and the Fort Benning project was the Atlas Supply Company of Atlanta, Georgia** (R. 103-104, 171).

On October 7, 1955, there was executed a supplemental agreement between Pickard and Southern (Deft. Ex. 1; R. 73-78) which recited that Pickard held three subcontracts with Southern at Fort Benning and one subcontract for work at Fort Campbell; that Pickard had been unable to obtain performance bonds on these various jobs; that Southern had been holding certain funds due him in lieu of said bonds; and that Pickard was in need of funds with which to complete the jobs and to pay other bills. Under this agreement Southern waived the provision requiring performance bonds, and Pickard waived all claims against Southern as a result of the withholding of any funds due Pickard in lieu of bond. Pickard further authorized Southern to withhold all other and further payments on work completed or to be completed during the course of the jobs until the completion of each job by Pickard and the final acceptance and payments thereof by the Army to Southern, excepting payments therein agreed to be made, "plus additional payments which will be made by Southern either jointly to Pickard and to subcontractors or material men, or to Pickard, as Southern is paid on requisitions which include labor and/or materials furnished by such subcontractors and/or material men" (R. 104-105, 171-172).

On December 16, 1955, Pickard's men left the job at Fort Campbell, Tennessee, and were never heard from again. No notice of any sort was given by Pickard or any representative on his behalf of the withdrawal, the purpose thereof, or the reasons therefor (R. 106, 172). At the time when Pickard withdrew from the Fort Campbell project, the work required there under his subcontract was from 96% to 98% completed (Id.). Southern completed the work at Fort Campbell and obtained final settlement from the United States Government in April, 1956 (Id.).

Shortly after Pickard left the work at Fort Campbell he also left the Fort Benning project (R 107, 172).

On October 7, 1955, when the supplemental agreement was executed, and at all times thereafter **Pickard owed an unpaid balance in the amount of $34,520 to Atlas Supply Company for materials furnished to Pickard by Atlas at Fort Campbell** (R. 107, 172).

In addition to this amount, Atlas Supply Company was claiming a balance due it from Pickard in the sum of $104,000 on the Fort Benning job (R. 107, 172). **Southern did not dispute the amount of the Atlas Account at Fort Campbell. However, it disputed the Fort Benning Claim of Atlas in its entirety** (R. 107, 172, Test. Baxter, R. 20, 132-133, 135).

In August, 1956, a conference was had between Southern officials and representatives of the Atlas Supply Company. As a result of this conference Southern paid to Atlas Supply Company, in August, 1956, the sum of $35,000 and obtained from Atlas a complete release of its liability under the Miller Act on Pickard's accounts, both at Fort Benning, Georgia, and at Fort Campbell, Tennessee (R. 108, 172-173, Pl. Ex. 22; R. 27-29).

At the time when this payment was made by Southern to Atlas, Atlas had consolidated its accounts against Pickard

and was carrying them as one consolidated account. Atlas credited the $35,000 payment against this single account, so that **Pickard received full credit for this payment on his indebtedness to Atlas.** Neither Southern nor Atlas at the time of this payment specifically undertook to allocate the $35,000 payment, or any part thereof, to one project or the other (R. 108, 173).

Pickard gave no credit to Southern for this payment on either job, and his books did not reflect the payment (R. 108, 173; Test. Senn, R. 129). There is no evidence that Pickard knew of the payment in August, 1956, but in April, 1957, his attorneys were advised by the attorney for Southern that the payment had been made, and that the same had not been allocated by Southern either to the Fort Benning or the Fort Campbell project (R. 108, 173; Pl. Ex. 32; R. 22-23; Deft. Ex. 6; R. 24-26).

In December, 1956, Pickard filed suit in the District Court for the Middle District of Georgia against Southern and the Continental Casualty Company on **both the Fort Benning contract and the Fort Campbell project** (R. 108, 173; Original Complaint, R. 29-33). Southern filed an answer and counterclaim in which it alleged that it had paid to Pickard sums in excess of the total contract price on each job and sought judgment for such excess. Included in the counterclaim at this time was the $35,000 payment made in August, 1956, to Atlas (R. 109, 173; Answer and Counterclaim, R. 35-36).

In April, 1957, however, Pickard filed the present action in the United States District Court for the Middle District of Tennessee on **the Fort Campbell project only** (R. 109, 173; Complaint, R. 81-84). The Fort Campbell phase of Pickard's claim was subsequently eliminated from the Georgia proceedings and was not litigated in the Georgia case (R. 173; Pre-Trial Statement in Georgia case, R. 40).

According to the Opinion of Judge Bootle (the District Judge in Georgia), this pre-trial statement and the amendment eliminating the Tennessee contract occurred "on the morning of the first day of the trial" in Georgia—March, 1959, just prior to commencement of the actual trial (R. 150).

Pickard's reason for filing the separate suit in Tennessee was that the Miller Act itself requires that every suit brought under its provisions "shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . ." 40 U. S. C. 270b (b). The question of jurisdiction had not been raised by Southern or Continental Casualty in the Georgia proceedings, and the separation of the two suits was made at Pickard's own instance, because of "jurisdictional" reasons (R. 173. See pre-trial statement in the Georgia case, R. 40).

The Georgia case was tried first, in March, 1959. In the trial of that case Pickard introduced certain sworn exhibits in which he purported to list all of the payments made by Southern to him or on his behalf at Fort Benning and to give credit for the same. He **did not include this $35,000 payment made to Atlas by Southern in August, 1956**, although his counsel had had a copy of the check in their possession long before the time of the Georgia trial (R. 109, 174; Pl. Ex. 32, R. 22-23).

Southern listed on exhibits filed by it in that case the payments made by it to Pickard or on his behalf on the Fort Benning job, for which Southern claimed credit. **The $35,000 payment made to Atlas was not claimed in these exhibits** (Test. Senn, R. 123, 132; Test. Baxter, R. 133,134). The District Judge found as a fact in the present case that the $35,000 payment to Atlas in August, 1956, **was not submitted to or considered by the jury in the trial**

of the Fort Benning case. He further found as a fact that **this item had not been litigated or adjudged by the District Court in Georgia,** and that **credit for it was neither given by Pickard nor claimed by Southern in the previous proceedings between the parties in the Georgia Court** (R. 109; see also oral statement of District Judge, R. 96). The Court of Appeals for the Sixth Circuit did not disturb these findings (R. 174).

The District Judge stated in his findings of fact that although the $35,000 payment was included in the original counterclaim filed by Southern in the Fort Benning case, it was, prior to the trial in that case, eliminated by Southern from its counterclaim, that it was included by Southern as part of its counterclaim and defense in the present suit, and that Southern claimed credit for $34,520 thereof toward the contract price of the Fort Campbell project (R. 109-110). The **District Judge allowed the credit claimed in the Tennessee case** (R. 116-121), but as previously stated, the Court of Appeals for the Sixth Circuit reversed this holding and held that under Rule 13 (a) of the Federal Rules of Civil Procedure Southern was **compelled** to claim the $35,000 its entirety in the Georgia case (R. 178-182):

> As stated, the Court of Appeals for the Sixth Circuit reached this result in spite of the equities and justice of the case, indicating that it might have reached a different result "if there had been an allocation of the $35,000 payment between the indebtedness to Atlas Supply Company at Fort Benning and the indebtedness at Fort Campbell" (R. 181). The Court entirely overlooked the basic principles of law governing the power of any court to allocate payments between disputed and undisputed accounts, or to allocate payments according to basic principles of equity and justice. See **U. S. for use of Carroll v. Beek**, 151 F. 2d 964 (6 Cir., 1945); **Bain-Nicodemus, Inc., v. Bethay**, 40

Tenn. App. 487, 292 S. W. 2d 232 (1953); 40 Am. Jur., **Payment**, § 129.

The Court of Appeals for the Sixth Circuit reached its decision by a very technical construction of Rule 13 (a). It held that the $35,000 payment was "a potential compulsory counterclaim" in either of the two suits which Pickard had filed, and that its "compulsory status" matured in the suit **"in which and at the time when Southern first filed a responsive pleading"** (R. 181). It entirely overlooked the fact that Pickard himself had made an error of procedure and had embraced the Tennessee contract in the Georgia suit, **so that at the time when Southern first had to file a responsive pleading, both contracts were embraced in the Georgia case.** The holding indicates that the plaintiff may at his discretion delete part of his initial suit, file it elsewhere, and **thereby deprive the defendant of the right to defend the second suit on its facts**, because of the existence of Rule 13 (a). None of the cases cited by the court presented fact situations even closely similar to the present case.

We respectfully submit that Rule 13 (a) was never intended to accomplish an inequitable result such as was reached in the present case, and that the facts of the present case do not fall within Rule 13 (a). **The basic purpose and spirit of Rule 13 (a) was to prevent multiplicity of litigation. The defendants and petitioners in the present case have in no sense violated the purpose of that Rule.** They **have not initiated any suit at any time,** but **have simply sought to defend two separate suits upon the basic facts pertaining to each.**

The item of $35,000 is not in a true sense a "counterclaim" but actually constitutes a payment, and is a matter of defense. Southern undertook, because of the undisputed underlying facts, to allocate $34,520 of the payment

to the Tennessee case, and the District Judge held that it had this right, and that Pickard could not possibly be prejudiced by the proposed allocation, since he received full benefit of the payment and had not himself undertaken to allocate or give credit for it in either of the two suits which he had brought. The holding of the Court of Appeals for the Sixth Circuit compels Southern to undertake to reopen the Georgia case and to claim the entire item in that case, despite the fact that Southern did not recognize any liability to Atlas on the Georgia contract, and disputed Pickard's account with Atlas in Georgia in its entirety, while recognizing the validity of Pickard's indebtedness to Atlas in Tennessee to the extent of $34,520.

SUMMARY OF ARGUMENT.

I.

Petitioners respectfully submit that the decision of the Court of Appeals below misinterprets and misapplies Rule 13 (a) of the Federal Rules of Civil Procedure regarding compulsory counterclaims. The purpose and intent of Rule 13 (a) was to avoid and prevent multiplicity of litigation, and to compel parties to litigation to try in one suit the various claims and differences between them with respect to a particular "transaction or occurrence."

The rule is, of course, designed to prevent the defendant from asserting his offensive claims in a separate forum, and is designed to prevent his instigating new litigation in the same or a different court. It never was designed to apply to, and never contemplated, a situation where a plaintiff had brought two separate suits against a defendant on two separate contracts.

There is no question in the present case but that the sum of $35,000.00 was paid by Southern on Pickard's behalf, on debts which Pickard himself certified to be lawfully due and owing. There further can be no controversy but that Pickard himself made no allocation of the payment in question, did not insist that the payment applied either wholly or in part to the Georgia contract, and stood silent on the trial of the Georgia case when Southern did not claim the payment there.

We earnestly submit that there is nothing whatever in Rule 13 (a) of the Federal Rules of Civil Procedure to prevent a defendant from making a proper application of his payments in framing his defenses to two separate lawsuits growing out of two separate contracts.

II.

The Court of Appeals for the Sixth Circuit did not cite any authority for its holding that Southern was obli-

gated to claim the entire payment in the Georgia case, and prohibited from ever claiming any part of it in the Tennessee case when the Tennessee contract became the subject of a second suit. None of the cases cited by the Court of Appeals presents any fact situation similar to the uncontradicted facts in this record. As far as we have been able to ascertain, this case is one of first impression.

III.

The opinion of the Court of Appeals for the Sixth Circuit ignored a long line of cases from this court and innumerable cases from the nation at large, including cases from Tennessee and from the Sixth Circuit itself, to the effect that when neither a debtor nor a creditor has made an application of a payment, and there exist multiple accounts between the parties, then the court may make application of the payment according to principles of equity and justice. Viewed in the light of this well-settled and incontrovertible principle, we submit that there can be no question but that the District Judge in the present case made a correct application of the payment in question when he permitted credit for the same on the Tennessee contract. There could be no possible prejudice to the plaintiff by this application; and to compel the petitioners to claim the payment in the Georgia case, after the Tennessee contract had been deleted therefrom, would be to compel them to claim it on a contract to which they did not consider it applicable, and to deny them credit for it on a contract where all but a very minor portion of the entire amount was admittedly due and owing.

In the last analysis, the item in question constitutes merely a payment, and is not in a true sense a "counterclaim" at all but an affirmative defense under Rule 8 (a) of the Federal Rules of Civil Procedure.

ARGUMENT.

A. Rule 13 (a) Does Not Govern.

This is a case of first impression. We have found no reported case which deals with the problem here presented. The undisputed facts show that the case does not fall within the literal terms of Rule 13 (a), and that only by a forced, harsh and inequitable construction of Rule 13 (a) has the Court of Appeals for the Sixth Circuit reached its decision. That Court ignored the basic equity and justice of the position of the petitioners; has ignored the basic meaning and purpose of the Federal Rules of Civil Procedure; and has evolved a new concept, that of a **"potential compulsory counterclaim in either of the two suits"**, while at the same time ignoring the fact that under its holding the **defendants were never afforded an opportunity to assert the item in question in the Tennessee suit.**

Actually Rule 13 (a) does not, by its terms, embrace a situation where there are two separate pending actions by the same plaintiff against the same defendants. This is a fact situation which may be unusual, but it is clearly presented in the present case. In order correctly to apply Rule 13 (a) in any situation, the purpose and underlying reason for the rule must be examined; and when this is done, it is clear that Rule 13 (a) was promulgated for the purpose of **preventing multiplicity of litigation** between parties having opposing claims against each other. It never was designed **to prevent a defendant from asserting his defenses** according to the facts underlying them where there are two separate and distinct transactions between the parties which are the subject matter of two separate and distinct suits.

Such was the situation presented here. Southern was first sued in Georgia by Pickard on both contracts. As long as the suit remained thus, there was no reason for

Southern to try to allocate the $35,000 payment between either of the two jobs, since its defenses and counterclaims on both contracts could be asserted in the one suit. **We concede that as long as the case remained in this posture, Southern could not itself have "split off" part of its defenses or counterclaims and filed a separate suit against Pickard in another jurisdiction.** This was the type of procedure disapproved in **United States v. Eastport Steamship Corporation**, 255 F. 2d 795 (2d Cir. 1958). **When, however, Pickard himself deleted part of his claim and brought a separate suit thereon in Tennessee, we submit that basic fairness and justice dictate that the defendant to the second action be permitted to frame his defenses according to the factual basis upon which his payments were made.** Under the undisputed facts in this case, the $35,000 payment made by Southern to Atlas in August, 1956 pertained to a wholly undisputed account of $34,520 arising out of the Fort Campbell contract, and to settlement of a wholly disputed claim of Atlas against Southern and Pickard at Fort Benning. Southern did not concede the Fort Benning account to be valid in the least, and disputed in its entirety the Atlas claim that Pickard was indebted to it at Fort Benning.

Southern, of course, under the Miller Act was secondarily liable to all suppliers of Pickard on either job. The fact that Southern must have been correct in its position that the Fort Benning account was entirely inaccurate is plainly borne out by the fact that Atlas gave Southern a complete release on both jobs for the sum of $35,000. Southern was a bonded and reputable contractor, and there was no possible reason for Atlas so drastically to reduce its claims unless Southern's position were entirely correct. Pickard, of course, was shown by the evidence to be unable to provide a bond, and was an insolvent subcontractor. By settling with Southern, Atlas gave up any practical hope of recovering on its accounts with Pickard,

and in releasing Southern and Continental Casualty, it released the only sources from which it might have any real hope of collection.

We recognize the words "transaction or occurrence" found in Rule 13 (a) are given a broad and liberal interpretation. There can be no quarrel with this, when viewed in the light of the purpose of Rule 13 (a) to prevent multiplicity of litigation. **The decided cases deal with fact situations where a defendant has a potential counterclaim against the plaintiff, and undertakes himself to initiate new litigation against the plaintiff in a different court or in a different suit.** It was this type of procedure which Rule 13 (a) was designed to prevent. The Rule has no application, however, to the situation now presented.

The District Judge, we submit, correctly analyzed the situation when he said that Southern was faced with a situation where the item of $35,000, if it fell within Rule 13 at all, could well have been compulsory in either case **if the two suits had been filed simultaneously and separately.** It certainly pertained, almost in its entirety, to the Tennessee "transaction or occurrence." It pertained, if at all, only very slightly and incidentally to the Georgia "transaction or occurrence." It certainly would be inequitable, unjust and unfair to require the defendant to assert the item in the Georgia case **without ever having a chance to assert it in the Tennessee case.** The District Judge held, of course, that if Southern had undertaken to litigate the item in the Georgia case, it could not do so in Tennessee. Where, however, neither Southern nor Pickard recognized the item in the Georgia case as it finally went to trial and where credit was neither given nor claimed for it there, the District Judge held that the claim could be asserted in the Tennessee case. We submit that this holding was eminently correct, and that the holding of the Court of Appeals to the contrary is

based upon a strained, abstruse and incorrect interpretation of Rule 13 (a).

B. Authorities Cited by the Court Below.

In dealing with the "compulsory counterclaim" feature of this case, the Court of Appeals for the Sixth Circuit cited several cases in support of the proposition that failure to assert a compulsory counterclaim in a prior suit will bar its assertion in a later suit, on the principle of res adjudicata.

Of course, there can be no quarrel with this principle in light of the fact situations dealt with in each of the cases cited by the Court of Appeals. Even a cursory examination of those cases, however, shows that none of them presented a fact situation even remotely similar to the facts of the present case.

The case apparently most relied upon by the Court of Appeals for the Sixth Circuit, and one which was cited at three different places during the course of its opinion, was **United States v. Eastport Steamship Corporation**, 255 F. 2d 795 (2d Cir. 1958). In that case the United States Government had chartered certain vessels to Eastport, and contended that Eastport was indebted to the United States for additional rental in the amount of $31,102.71. In an entirely unrelated transaction Eastport had purchased a vessel from the United States Government and had brought suit to recover a reduction in purchase price because of necessary repairs to the vessel. Eastport had been awarded judgment in that suit for $54,097.16.

Controversy arose between the Government and Eastport as to whether the Government was entitled to offset its claim for charter rent against the judgment in making settlement with Eastport; and in fact the Comptroller General did make the deduction in making a payment to Eastport on its judgment in September, 1954. Imme-

diately thereafter, on October 7, 1954, Eastport brought suit in the United States Court of Claims on the unpaid balance of its judgment. The United States did not plead as a counterclaim or offset the amount of the charter rent, which was the amount remaining unpaid to Eastport on its previous judgment. Instead, the United States, on November 9, 1954, **brought a separate suit on its claim** for charter rent against Eastport in the United States District Court for the Southern District of New York.

A divided Court of Appeals for the Second Circuit held that the United States could not bring its claim against Eastport in the form of a separate action, but that it was obligated under a rule of the Court of Claims, similar to Rule 13 (a) of the Federal Rules of Civil Procedure, to claim its charter rent in the Court of Claims suit brought by Eastport. The Court of Claims had given judgment in favor of Eastport for the full amount remaining unpaid, and the failure of the United States Government to assert its claim for unpaid charter rent in that suit was held to bar its right **to bring a separate suit in a different court** on that claim.

We have no quarrel with the holding of this case, and have always conceded that Southern Construction Company would have had no right itself to begin independent litigation against Pickard on the $35,000 item in question.

In the **Eastport** case, the Court recognized the general rule that in order for a counterclaim to be compulsory under Rule 13 (a), there must be a "logical relationship" between the so-called counterclaim and the original action. It then said:

> "The logical relationship between Eastport's claim for interest and the Government's claim for additional charter hire is obvious. The former could not prevail unless the latter lacked merit." 255 F. 2d at 804.

In other words, there was no question of Eastport's asserting two different claims against the United States Government, and the Government's attempting to allocate payments or credits between the two separate suits. It was simply a question of the Government's violating the obvious purpose of the Rule by undertaking to initiate separate litigation in another forum. The Court of Appeals said:

> "The issues raised by the respective claims were identical. **The failure of the Government to plead its counterclaim could only result in the multiplicity of suits which it is the function of the compulsory counterclaim rule to avoid.**" 255 F. 2d at 805.

Accordingly, we respectfully submit that the case does not support the holding of the Court of Appeals for the Sixth Circuit in the present case.

Three other cases cited by the Sixth Circuit, **Hancock Oil Co. v. Universal Oil Products Company**, 115 F. 2d 45 (9th Cir., 1940); **Pennsylvania R. Co. v. Musante-Phillips, Inc.**, 42 F. Supp. 340 (N. D. Cal. 1941); and **Gallahar v. George A. Rheman Co.**, 50 F. Supp 655 (S. D. Ga. 1943), merely deal with permitting the defendant to file a counterclaim in the original action brought by the plaintiff. In the **Hancock Oil Co.** case the defendant simply sought leave to amend its answer to include a counterclaim, and in the other two cases motions to strike or dismiss counterclaims were involved. None of the cases involved situations where there were two suits between the same parties, and none of them is in any way analogous to the fact situation of the present case.

The Court of Appeals below also cited the leading case of **United Artists Corporation v. Masterpiece Productions, Inc., et al.**, 221 F. 2d 213 (2d Cir. 1955). This case dealt primarily with the question of whether independent jurisdiction must exist regarding defendants to counterclaims,

and on its facts is unrelated to the situation presented in the present case. It follows the well-known rule that a counterclaim is said to arise out of the "transaction or occurrence" that is the subject matter of the plaintiff's action if the counterclaim bears a "logical relationship" to the original action. See also **Moore v. N. Y. Cotton Exchange**, 270 U. S. 593, 70 L. Ed. 750, 46 S. Ct. 367 (1926).

As previously stated, we make no question concerning the correctness of this rule, but we submit that the Court of Appeals for the Sixth Circuit has misapplied it here. Certainly the "logical relationship" test would indicate that the payment here involved belonged in the Tennessee case, rather than in the Georgia case, in view of the uncontradicted facts in the record. It would seem to be carrying the "logical relationship" rule to an illogical extreme when the defendant is required to claim credit for a payment on a contract to which he insists the payment does not appertain, and is denied credit for such payment on another contract where all parties admitted the payment was due and owing.

The only other case cited by the Court of Appeals was **Arvey Corporation v. Peterson**, 178 F. Supp. 132 (E. D. Pa., 1959). This case again turned on a motion to strike a counterclaim filed by a defendant, and did not involve a situation where two separate suits were brought against a defendant.

C. Allocation of Payments.

The Court of Appeals for the Sixth Circuit did not discuss or consider the power of a Court, upon basic principles of equity and justice, to allocate payments which have previously been unallocated by the debtor or creditor. This matter was briefed and argued before the Court, both in the original briefs and on Petition for Rehearing, but apparently was not given any consideration whatever by the Court of Appeals.

This case was very carefully and thoroughly tried by the District Judge. By agreement, questions pertaining to the $55,000 item in question were decided by the Judge rather than the jury (R. 116). During the course of the trial, the District Judge commented from the bench in connection with this matter as follows (R. 128-129):

> "The Court: It is a very important thing. It is an unusual situation the way it was handled. There is no question about that due to this complex relationship between the parties, I suppose, primarily, and the fact that it was immaterial in the beginning to allocate it. That led to the original way of treating it, not allocating it to one or the other.
>
> "This Court is interested in doing what is equitable between the parties and what is just and fair. Of course, if I am bound by a technical rule of law, then I am bound, and there is no way I can get out of it; but if I have any discretion, then I am going to do what I think is equitable and what I think is fair. If, in fact, the people who paid this $55,000 have never gotten any benefit from it whatsoever and have gotten no credit for it, that is going to be a strong consideration in my mind in trying to reach a proper solution of this controversy."

From its very early days, the Supreme Court of the United States has recognized the power of a Court to allocate previously unallocated payments according to fairness and equity. Thus Mr. Justice Story in the case of **The United States v. Kirkpatrick et al.**, 9 Wheat. U. S. 720, 6 L. Ed. 199 (1824) said:

> "The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, **the law will apply the payments according to its own notions of justice.**" 9 Wheat. at 737; 6 L. Ed. at 203.

This Court has unhesitatingly followed the foregoing rule in many other cases. See, for example, **National Bank of New York City v. Mechanics' National Bank**, 94 U. S. 437, 24 L. Ed. 126 (1877); **Korbly v. Springfield Institution for Savings**, 245 U. S. 330, 38 S. Ct. 88, 62 L. Ed. 326 (1917).

It would, of course, be obviously inequitable to force a party to have his payments allocated to a disputed account, where there existed another *recognized and undisputed* obligation. See **Standard Surety & Casualty Co. v. U. S., for Use and Benefit of Campbell**, 154 F. 2d 335 (10th Cir. 1946). There the Court of Appeals for the Tenth Circuit said:

> "No designation of payment having been made by either the debtor or the creditor, it was the duty of the court to designate the accounts to which these payments should be applied." 154 F. 2d at 337.

After quoting from the **Kirkpatrick** case, *supra*, and pointing out that the Court rather than the parties had to make an allocation after controversy arose, the Court said:

> "By the same reasoning, **it would be inequitable for a court, when it is called upon to make an application to one of several accounts, to apply it to an account which is in dispute between the parties. That would be aiding one of the parties to the detriment of the other.**" (*Ibid.*)

This principle would seem to be so well settled as to require little further elaboration. For collection of authorities, see 40 Am. Jur., **Payment**, § 129; Annotation 164 A. L. R. 940.

That the foregoing principles are well settled in Tennessee, see **Bain-Nicodemus, Inc. v. Bethay**, 40 Tenn. App. 498, 292 S. W. 2d 234 (1953). Indeed, the Court of Appeals for the Sixth Circuit itself has recognized these principles

and has held that a Court has power to **reallocate** payments between the parties in the interests of equity and fairness. **U. S. for Use of Carroll v. Beck**, 151 F. 2d 964 (6th Cir., 1945).

Tested by these principles, we submit that there can be no question but that the credit sought by Southern in the Tennessee case should be allowed. It admitted owing $34,520 on behalf of Pickard at Fort Campbell, Tennessee. It denied owing anything on his behalf to the Atlas Supply Company at Fort Benning, Georgia. Southern was obviously correct in its contentions, because Atlas accepted $35,000 in full settlement of all of its claims on both jobs.

Further, there can be no possible prejudice to Pickard by the allowing of credit to Southern in the Tennessee case. Knowing that the payment had been made on his behalf, having a copy of the check in his possession, and being under oath, in the trial of the Georgia case he listed all of the payments made by Southern on the Fort Benning job for which he acknowledged that Southern was entitled to credit on the Georgia contract. **He did not list or include the $35,000 payment now in question. Southern likewise did not list or include it in the Georgia trial.** In pretrial motions filed by Southern, the payment had been referred to for purposes of illustrating that the Pickard account with Atlas on the Fort Benning job was in sharp dispute. But in actual litigation of the Georgia contract on its merits, credit for this item was neither sought by Southern nor given by Pickard.

Yet when Southern sought to claim credit for the payment on the Tennessee contract, Pickard took the position that Southern had to claim the credit in the Georgia case or forever lose it. It is not surprising that this position was not appealing to the District Judge, and even when the Court of Appeals for the Sixth Circuit upheld it, it recognized the inequity and harshness thereof.

In the last analysis, of course, the $35,000 item was not, in the true sense, a "counterclaim." It was nothing more than a payment which, under Rule 8 (c) of the Federal Rules of Civil Procedure, is an affirmative defense. Southern waived at the trial any affirmative relief against Pickard, and simply claimed that it had made payments on Pickard's behalf, or to him, in the full amount of the contract price, or in excess thereof. The Trial Judge and the Court of Appeals have both held that Pickard was not entitled to claim rescission of the contract between the parties or to seek any recovery greater than the original contract price, and Pickard has not sought review here of those holdings.

Pickard's contract with Southern was in the amount of $50,000. When Pickard sought to recover this amount in the Tennessee case, Southern sought to show that it had paid for the account of Pickard the sum of $34,520 to one of Pickard's suppliers. Indeed Southern was legally obligated to make such payment under the Miller Act, since Southern was secondarily liable under that act to the suppliers of Pickard. Southern claimed this payment as a credit on the contract price, and clearly the item came within the affirmative defense of payment, where the defendants had a fixed obligation by law under the provisions of the Miller Act here involved.

The fact that the petitioners elected not to claim affirmative relief from Pickard in the trial, and elected rather to treat the payments which they had made as defensive only, does not affect the fundamental nature of the payment made, and should not deprive the defendants of credit therefor. As stated in a recent case, **Desjardins v. Desjardins**, 193 F. Supp. 210, 215 (E. D. Ky. 1961):

> "In determining the credits to which the defendant is entitled, a question in the refinement of pleading arises. Strictly speaking, the defendant's proper

remedy was to plead by way of counterclaim the sum allegedly due the estate of the decedent by reason of any failure of the plaintiff to perform her obligations under the decree. Rule 13, Federal Rules of Civil Procedure, 28 U. S. C. A.

"However, the defendant has elected (as she properly may) to plead the plaintiff's obligations only as matters in defense against the plaintiff's claim. Equity dictates that the court treat the defense as one of recoupment which, while not in the nature of an affirmative claim for judgment and not justifying such a judgment, may be interposed in diminution of a plaintiff's claim in a case such as this. See Restatement, Judgments, pp. 217, 238 (1942); **Bull v. United States**, 1935, 295 U. S. 247, 55 S. Ct. 695, 79 L. Ed. 1421; **City of Grand Rapids, Mich. v. McCurdy**, 6 Cir. 1943, 136 F. 2d 615, 619; **United States Plywood Corp. v. Hudson Lumber Co.**, D. C. S. D. N. Y. 1955, 17 F. R. D. 258; **Jefferson, Noyes & Brown v. Western Nat. Bank**, 1911, 144 Ky. 62, 138 S. W. 308."

It would seem that Rule 8 (*c*) of the Federal Rules of Civil Procedure expressly contemplated that one might use payments defensively and seek credit therefor, without seeking an offensive judgment against the original plaintiff. The rule provides:

> **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively . . . payment . . . and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, **the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.**" Fed. Rules Civil Procedure, Rule 8 (*c*).

CONCLUSION.

The very first of the Federal Rules of Civil Procedure promulgated by this Court states that the Rules **"shall be construed to secure the just, speedy and inexpensive determination of every action."** The decision of the Court of Appeals for the Sixth Circuit violates both the spirit and the purpose of the Federal Rules of Civil Procedure, and misapplies a wholesome and desirable Rule concerning counterclaims so as to effect a most unjust, harsh and improper result.

Petitioners earnestly submit that the decision of the Court of Appeals for the Sixth Circuit concerning the compulsory counterclaim feature of this case should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

CHARLES C. TRABUE, JR.,
Nashville 3, Tennessee,
Attorney for Petitioners.

Of Counsel:

TRABUE, MINICK, STURDIVANT & HARBISON,
26th Floor, Life & Casualty Tower,
Nashville 3, Tennessee,

HULL, WILLINGHAM, TOWILL & NORMAN,
Southern Finance Building,
Augusta, Georgia,

HARRY S. McCOWEN,
2634 Bank of Georgia Building,
Atlanta, Georgia.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 46

SOUTHERN CONSTRUCTION COMPANY, INC., and CONTINENTAL CASUALTY COMPANY, *Petitioners*

v.

UNITED STATES TO THE USE OF SAMUEL J. PICKARD, D/B/A PICKARD ENGINEERING COMPANY, *Respondent*

BRIEF ON BEHALF OF RESPONDENT

EDWARD GALLAGHER
500 Federal Bar Building
Washington 6, D. C.
Attorney for Respondent

Of Counsel:

GRACEY, BUCK, MADDIN & COWAN
434 Stahlman Building
Nashville 3, Tennessee

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 46

SOUTHERN CONSTRUCTION COMPANY, INC., and CONTINENTAL CASUALTY COMPANY, *Petitioners*

v.

UNITED STATES TO THE USE OF SAMUEL J. PICKARD, D/B/A PICKARD ENGINEERING COMPANY, *Respondent*

BRIEF ON BEHALF OF RESPONDENT

STATEMENT OF QUESTIONS PRESENTED

Involved here is Rule 13(a), Federal Rules of Civil Procedure, relating to compulsory counterclaims. Identical parties were involved first in a proceeding in the Federal Court in Georgia, later in the Federal Court in Tennessee. Petitioner filed a counterclaim in the first proceeding in Georgia, then later deliberately deleted one item of $35,000, from the Georgia counterclaim, for later use in Tennessee. The Court of Appeals for the Sixth Circuit has found that the item in

question arose out of the transaction which was the subject matter of the suit filed in Georgia, within the meaning of the Rule.

Respondent states that under Rule 13(a), which is mandatory, petitioner could not deliberately divide the items of its counterclaim; that it was bound to file its counterclaim in full in the first Georgia proceeding, which it did; and that any item subsequently deleted was thereafter barred for all purposes. It was *res judicata* in the subsequent Tennessee proceeding. The Court of Appeals for the Sixth Circuit has so ruled, and the question presented is whether this ruling was correct.

STATEMENT OF THE CASE

This is essentially a contract proceeding involving a government contract for rehabilitation of certain barracks at Fort Benning, Georgia, and Fort Campbell, Tennessee. Respondent subcontracted to do the mechanical work at both places for petitioner Southern Construction Company, which was the prime contractor with the government.

On the theory it had not been fully compensated, respondent instituted proceedings under the Miller Act (Aug. 24, 1935, Ch. 642, 49 Stat. 793, Title 40, secs. 270(a)-270(d)) against the prime contractor, and its surety, first on December 26, 1956, in the United States District Court for the Middle District of Georgia, and later on April 4, 1957, in the United States District Court for the Middle District of Tennessee. (R. 29, 81, 1) The statute required the proceedings to be separate, as it provides suit must be instituted in the District where the work was performed, and "nowhere else." The present controversy revolves around a

counterclaim asserted by petitioner in these proceedings, and the proper application of the compulsory counterclaim rule (Rule 13(a), Federal Rules of Civil Procedure) to the counterclaim. It has been respondent's position that the item in question could only be entertained by the Georgia Court; petitioner has attempted to prove it in the Tennessee proceeding.

The Georgia case was tried first in March, 1959, before a jury, and resulted in a general verdict for respondent. Judgment was entered on March 18, 1959, and a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial was promptly filed by petitioner. On March 31st of the following year the Georgia Court granted the motion N.O.V., and entered judgment for petitioner. As to the motion for a new trial, the Court at the same time said: "The Court makes no ruling at this time on the defendants' motion for a new trial on the main case nor on the defendants' motion for a new trial on the counterclaim." (R. 45) The motion for a new trial on the counterclaim was recently granted, and proceedings on the counterclaim are presently in progress in the Georgia court.

The case in Tennessee was tried in Nashville, in October, 1959, and was tried before a jury, to which special questions were submitted, with the exception that the issue pertaining to the counterclaim was tried exclusively before the Court by agreement of counsel. The findings of the jury on the questions submitted to it were favorable to respondent (R. 10), whereupon petitioner filed a motion for judgment N.O.V., and for a directed verdict. By the terms of the Court's findings of fact and conclusions of law relating to the counterclaim, it became unnecessary for the Court to rule

on this motion, as its findings and conclusions pertaining to the counterclaim led to a judgment for petitioners. (R. 116-121) Respondent filed a motion for amendment of the findings of fact and conclusions of law, which was denied. (R. 61) Respondent appealed to the Court of Appeals for the Sixth Circuit, which reversed the lower court ruling that allowed the counterclaim, vacated the judgment, and remanded the case for further proceedings consistent with its views. (R. 178-182) Petitioner sought certiorari to this Court, which was granted.

The record in this proceeding shows there were three separate contracts between respondent and petitioner at Fort Benning, Georgia, totalling $513,075.11. There was one contract at Fort Campbell, Tennessee, at a contract price of $50,000. The largest single supplier for respondent on both projects was Atlas Supply Company of Atlanta, Georgia. When plaintiff's work was terminated on both jobs, in January, 1957, Atlas was owed on both jobs a total of $139,492.06, the figures being $104,971.12 for deliveries to the Benning job, and $34,520.94 for deliveries to the Campbell job, for which sums respondent was and is primarily liable, and petitioner had a contingent liability under the terms of the Miller Act. (R. 107, 172) To discharge its own liability, but not the liability of respondent, petitioner, on August 28, 1957, eight months after the work was terminated, settled the entire account by a payment to Atlas of $35,000, and it is around this item that the present controversy centers. (R. 27, 28)

Atlas carried this account of the plaintiff on its books as one single, indivisible account at the time the $35,000 settlement payment was made. (R. 173, 108)

The evidence shows that the sum of $35,000 was paid in settlement of the total amount. It is so stated in the

release that was delivered in return for the check. (R. 27, 28). The witnesses for petitioner, as well as its counsel, admit that there never was any attempt to allocate this item of $35,000 to the Fort Campbell account as distinguished from the Fort Benning account. (R. 14, 18, 118) On the contrary, the evidence shows that sometime after the Tennessee suit had been filed (April 4, 1957) counsel for petitioner addressed a letter to counsel for respondent (April 15, 1957) in which it was stated that, "This was an over-all lump sum settlement, and we are unable to allocate this amount as between Fort Campbell and Fort Benning." (R. 22)

The facts surrounding the filing and proving of the counterclaim are as follows—first so far as the pleadings in both cases are concerned: In the counterclaim that was originally filed in the Georgia suit, on January 30, 1957, the $35,000 item was included. (R. 109, 173, 174) Thereafter on August 5, 1958, defendants filed a motion for summary judgment in the Georgia case as to "the three contracts at Fort Benning." (R. 45) In Paragraph III of this motion, summary judgment is requested on the counterclaim as originally filed. There is no amendment or deletion to the counterclaim, even though the motion itself is confined to the "three contracts at Fort Benning." (R. 47) In support of this motion affidavits were filed by petitioner stating that the $35,000 was paid "in full satisfaction of a total claimed invoice by Atlas in the amount of $104,917.12," which was the exact amount of the Benning deliveries, exclusive of the Campbell deliveries. (R. 51) It is clear that at this juncture in the Georgia proceedings the defendants were seeking to apply the $35,000 payment to the Benning contract, and were seeking judgment on their pending counterclaim ac-

cordingly. It is true that a short time later an additional more voluminous and separate motion for summary judgment on the counterclaim was filed in the Georgia case, wherein a reduction in the total contract figures would seem to indicate that the item in question was being omitted, but, here too, there was no corresponding reduction in the amount of the counterclaim itself, and as it was set forth in the original pleading. (R. 35) It is also true that an exhibit subsequently introduced by petitioner at the Georgia trial does not include this item. In summary, it can thus be said that so far as the pleadings in the Georgia case are concerned, the item of $35,000 was included to the end; also, it was affirmatively pursued in the Georgia proceeding at least until the time of the first motion for summary judgment. Indeed, even the pre-trial statement signed a few days before the Georgia trial, leaves defendants intentions in some doubt. In the pre-trial statement, defendant amends its counterclaim and seems to include the Fort Campbell contract money within the terms of the amended counterclaim. (R. 41, 151)

Petitioner says it did not ultimately "claim" the item of $35,000 in the Georgia case, and that it did not do so, solely on the advice of its attorney; their attorney so testified in this proceeding. (R. 18) He testified that somewhere along the line he decided and advised his clients that they should delete the item from the Georgia case and claim the entire amount in the Tennessee proceeding, but he cannot say just when he did so, except that it was "sometime between April of 1957 and August of 1958." (R. 143)

This suit was filed in Tennessee on April 4, 1957. It was not until the pre-trial hearing in the Tennessee case shortly before the trial, on June 17, 1959, that peti-

tioner evidenced any clear-cut intention to split off the $35,000 for the purpose of asserting it in Tennessee. As a result of the pre-trial hearing, the defendant, on August 18, 1959, a few weeks before trial, amended its counterclaim with a computation hinged largely on the item of $35,000. (R. 18, 19) This was exactly four months after judgment had been entered against petitioner in the Georgia proceeding, on March 18, 1959, on the basis of the jury verdict. (R. 44) This action was followed up a few days before trial by a letter from counsel for petitioner dated September 14, 1959, addressed to counsel for respondent, in which he attempted to correct the advice contained in his previous communication of April 15, 1957 (R. 22), and in which he now stated that the item of $35,000 would be claimed in the forthcoming trial in Tennessee. (R. 24)

The Distrjct Court in Tennessee gave full weight to the counterclaim item of $35,000 in awarding judgment to petitioner. (R. 120) The judgment of the Court of Appeals for the Sixth Circuit reversing the lower court and remanding the case was entered on August 3, 1961. (R. 169) Rehearing was denied on August 30, 1961. (R. 182) On September 1, 1961, the Georgia Court entered an order granting petitioner's motion for a new trial on their counterclaim in the Georgia proceeding, the motion having been pending since the conclusion of the trial in that case on March 18, 1959. (Appendix "A", attached hereto). Certiorari in this case was granted on January 22, 1962. On March 2, 1962, petitioner filed an amendment to its existing counterclaim in the Georgia case for the sole purpose of expressly claiming and adding the $35,000 item; on the same date it filed a motion for summary judgment on the basis of the counterclaim as so amended, which mo-

tion for summary judgment is still pending in the Georgia proceeding. (Appendix "B" and Appendix "C", attached hereto) On August 2, 1962, the Georgia Court set the case for pre-trial on August 10, 1962, for the purpose of considering the counterclaim, as amended. (Appendix "D", attached hereto) This pre-trial hearing has since been postponed to a date to be hereafter fixed. The foregoing is the present status of the Georgia proceeding. It is suggested that the within appeal of petitioner may have been rendered moot by the current proceedings in the Georgia case.

SUMMARY OF ARGUMENT

The item in question is a compulsory counterclaim within the provisions of Rule 13(a), Federal Rules of Civil Procedure as it arose "out of the transaction" that was the subject matter of the suit filed in Georgia.

The applicability of the Rule is determined as of the date first responsive pleading was filed, which was in the Georgia proceeding. The compulsory character of the counterclaim was determined on that date.

The Rule has no application to the subsequently filed suit in Tennessee. For this reason, it cannot be held that for the purposes of the Rule, the previously filed counterclaim in Georgia may be regarded as a pending action for purposes of applying the Rule to the Tennessee case. The Georgia counterclaim thus cannot be made the basis for an exception to the compulsory rule.

There is no equity working in favor of the petitioner. The decision to delete the item in question from the counterclaim that had already been filed in Georgia was solely the decision of counsel who thought the item could be utilized to greater advantage in the Tennessee case. Moreover, petitioner has always maintained an

anchor to the windward in the Georgia case, which it has recently utilized by reinstating the item in question in current Georgia proceedings.

ARGUMENT

The Counterclaim Item in Question Is Clearly Within the Provisions of Rule 13(a)

To render a counterclaim compulsory in character, and thus subject to the provisions of Rule 13(a), it must first appear that it arose from the same transaction or occurrence as is involved in the main suit. This is the controlling, if not the only, consideration.

The District Court found that,

> "The Fort Campbell and the Fort Benning projects constituted distinct and separate transactions between the same parties; Southern and Pickard; yet this payment of $35,000 unquestionably pertained to both. Thus it is a claim or payment which grows out of both transactions and is common to both. It therefore 'arises out of' the transactions at both Fort Benning and Fort Campbell." (R. 118)

The Court of Appeals for the Sixth Circuit agreed: "We are of the opinion that this payment arose 'out of the transaction' which was the subject matter of the suit filed in the District Court in Georgia, within the meaning of the Rule." (R. 179)

We do not understand that petitioner seriously disputes these findings. In its present brief (Page 4) it says,

> "One payment [$35,000 item] which had been made by the defendant Southern Construction Company on behalf of Pickard pertained almost entirely to the Tennessee contract, but it did in-

volve also, to some extent, the Georgia contract, and was, at least to a limited extent, incidental to the Georgia contract as well as to the Tennessee contract."

It cannot be said that the controlling consideration involved in the application of the Rule is in serious dispute. It has been found, or conceded, on all sides, that the counterclaim item in question arose out of the subject-matter of the Georgia suit. Indeed, it arose to a large extent out of the Georgia transaction. The total amount settled by the payment in question was $139,492.06; of this amount $104,971.12 represented materials delivered by Atlas to Fort Benning, and only $34,520.94 for materials delivered to Fort Campbell. (R. 107) The percentages are 75.25 per cent owed on the Fort Benning account, and 24.75 on the Fort Campbell account.

The release given in return for the payment states that it was,

"for all claims of whatsoever kind or character, which claims are disputed and denied, arising out of, or in any way connected with, or which might arise hereafter out of, the rehabilitation of Barracks, Mess Halls and Bachelor's Quarters at Fort Campbell, Kentucky, and Fort Benning, Georgia * * *."

The meaning of the words "transaction or occurrence" has been defined many times, and it is always said the words should be given a flexible meaning. The test generally applied in determining whether a counterclaim is compulsory is whether there is a logical relationship between the claim and the counterclaim. *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 610, 70 L. Ed. 750, 756; *American Mills Co.* v. *American*

Surety Co., 260 U.S. 360, 365, 67 L. Ed. 306, 309; *Lesnik v. Public Industrial Corporation*, Cir. 2, 144 F (2) 968, 975; *United States v. Eastport Steamship Corp.*, Cir. 2, 255 F (2) 795, 804. Such a logical relationship clearly is present in this case between the counterclaim and the Georgia contract.

Where It Is Applicable the Rule Requires That the Counterclaim Be Filed With the First Responsive Pleading

The Rule states that,

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party * * *."

Applying this language to the present case, it means that petitioner was compelled to file its entire counterclaim, including the item in question, at the time it filed its Answer in the Georgia case, which, of course, it did. *A fortiori*, it means that petitioner was not permitted to later split off a portion of the counterclaim which it decided it could use to better advantage in a later proceeding.

Some light is thrown on the purpose of this language by examining its background. Rule 13(a) was amended in 1948, but before the amendment it read as follows:

> "Compulsory Counterclaims. A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

After amendment it read as follows:

> "Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

By the amendment, the words 'not the subject of a pending action' were stricken, the word 'filing' was changed to 'serving,' and the words, 'except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action' were added to the end of the paragraph. Of this change the Advisory Committee Note says:

> "The rewording of the subdivision in this respect insures against any undesirable possibility presented under the original rule whereby a party having a claim which would be the subject of a compulsory counterclaim could avoid stating it as such by bringing an independent action in another court after the commencement of the federal action but before serving his pleading in the federal action."

It is clear that the circumstances prevailing at the time of answering the first suit prevail, and any counterclaim growing out of the same transaction or occurrence as the main claim must be asserted at that time, or be forever barred. *A fortiori*, and item of a counterclaim deleted subsequent to the time such a counter-

claim is served, is forever barred. *United States* v. *Eastport Steamship Corp.*, Cir. 2, 255 F (2) 795, 805. Or to state it another way, the Rule is mandatory (*Pennsylvania R. Co.* v. *Musante-Phillips, Inc.*, 42 F. Supp. 340, 341), has the force and effect of a statute (*Amer. Graphaphone Co.* v. *Natl. Phono Co.*, 127 F. 349), and it applies not only to all items that were included in the Georgia proceeding, but also to all items that were available to petitioner when it served its answer and counterclaim in the Georgia case. "Failure to file the counterclaim is *res adjudicata* of the relief which might have been obtained thereby." *Switzer Bros.* v. *Lacklin*, Cir. 7, 207 F (2) 483, 488; *Cleveland* v. *Higgins*, Cir. 2, 148 F (2) 722, 724.

The Present Case Is No Exception to the General Rule

Rule 13(a) makes an exception where the subject matter of the potential counterclaim has already been made the subject of a pending action, but this exception has no application to this case. It will be noted that the language is that the counterclaim need not be filed, "if at the time the action *was commenced* the claim was the subject of another pending action." (Italics supplied) Here again the history of the Rule is of interest. By the 1948 amendment the wording of the Rule pertaining to pending actions was revised, and the Advisory Committee Note states that the language was changed to its present form to insure against the filing of a new action by a defendant, in place of the filing of a compulsory counterclaim.

The circumstances existing at the time the responsive pleading is filed prevail, and the filing of an answer and counterclaim in the first suit by no means sets up a "pending action" for the purposes of a later and subsequent suit, within the meaning of the excep-

tion stated in the Rule. At the time petitioner filed its answer in the Georgia suit, no other action was pending involving the same subject matter, or the same transaction or occurrence, and this is the moment that controls. This is when the Rule is applied. The Rule does not apply to the second suit, but only to the first. Since the Rule has no application to the subsequent Tennessee suit, there is no occasion to determine whether another suit was pending when the Tennessee action was filed. The requirements of the Rule were already exhausted, either for good or for bad, when the Tennessee suit was filed. It is suggested that the basic error of the District Court lies in the fact that it attempted to apply the Rule as of the time when the Tennessee case was filed, rather than when the responsive pleading was filed in the Georgia case. By so doing, the District Court likewise fell into the error of reasoning that since the counterclaim was pending in Georgia when the suit was later filed in Tennessee. There was a pending action within the exception stated in the Rule, and that being within the exception, petitioner could file the counterclaim in Tennessee as a permissive counterclaim if it saw fit to do so. The mere statement of this theory would seem to answer it, as compulsory counterclaims and permissive counterclaims are mutually exclusive; a given claim cannot be both. A compulsory counterclaim grows out of the same transaction; to be permissive the claim cannot grow out of the same transaction. Since the item in question grew out of the transaction involved in the Georgia suit, which was filed first, it was compulsory there, and it could not take on a permissive character in the later Tennessee proceeding.

The Existence of a Dispute Concerning the Claim Can Have No Bearing On the Application of the Rule

Petitioner has been at great pains to show that it challenged the validity of the Benning portion of the claim, but not the Campbell part. It is not clear how this would affect the application of the Rule, even if true. Nearly all claims are disputed—that is usually what makes them a claim. The fact that a claim may be vigorously disputed on both sides does not lessen the requirement that it be handled and litigated in conformity with the express requirements of the Rule.

Indeed, the terms of the release given in return for the payment in question would indicate that all of Atlas' invoices on both Benning and Campbell were in dispute (R. 28):

RELEASE OF ALL CLAIMS

> "For and in consideration of the payment by Southern Construction Co., Inc. of the sum of $35,000.00, the receipt of which is hereby acknowledged the Undersigned, Atlas Supply Company does hereby release, satisfy and discharge Southern Construction Co., Inc., its agents and employees from and against any and all claims of whatsoever kind or character, *which claims are disputed and denied,* arising out of, or in any way connected with, or which might arise hereafter out of, the rehabilitation of Barracks, Mess Halls and Bachelor Officer's Quarters at Fort Campbell, Kentucky, *Fort Benning, Georgia,* under contracts with the U.S. Army, on which contracts Southern Construction Co., Inc. was Prime Contractor and S. J. Pickard doing business as Pickard Engineering Company was Sub Contractor." (Italics supplied)

Likewise, the existence of a dispute regarding one part of the claim does not permit the claimant or the

Court arbitrarily to allocate a payment to an alleged undisputed portion, after the inception of the litigation, in derogation of the plain demands of the Rule. It is well-settled that the power of the parties to allocate ceases after litigation has been instituted. "It is certainly too late for either party to claim the right to make the appropriation after the controversy has arisen, and, *a fortiori*, at the time of trial." *United States* v. *Kirkpatrick*, 22 U.S. 720, 738; 6 L. Ed. 199, 203; *Austin* v. *Southern Home Association*, 122 Ga. 439, 449, 50 S.E. 382; *Weaver* v. *Ogle*, 2 Tenn. App. 563 (1926).

It should be noted that the record does not define the nature of the dispute in question, beyond the mere assertion of it, nor does it clearly show the extent to which it affected the Benning (Georgia) account. There is strong evidence indicating that if it existed at all, it was only to the extent of $52,000 of the $104,197.12 owed on the Benning account; and also that even this disagreement was resolved by a payment of $100,000 in December, 1958, long before the counterclaim item of $35,000 was paid in the following August. (R. 59, 60, 21)

The main point is, however, that no considerations such as the existence of a dispute concerning a portion of the claim, or such as an attempt by one of the parties to allocate a payment, where it would do it the most good, after the inception of the litigation, will be permitted to alter the express terms of the Rule. The requirement of the Rule is mandatory, carries the force and effect of a statute, and it brooks no exceptions, other than those stated in the Rule itself. Were it otherwise, parties by their actions or allegations, could set up their own exceptions, or amendments, and thus nullify the purpose of the Rule, and destroy the benefits it was intended to achieve.

There Is No Equity Working In Favor of the Petitioner In This Case

Petitioner has argued at some length that since it got no credit for the item in question in the Georgia proceeding, it should be allowed to use it in the Tennessee case; that the present application of the Rule is harsh and unjust, and that principles of equity demand that it be afforded relief.

We cannot emphasize too strongly that this is not a case where a party has overlooked a valid item of counterclaim through error, or mistake, or even negligence, although this would not change the application of the Rule. *Beloit* v. *Morgan*, 7 Wall 619, 624; 74 U.S. 619, 624; 19 L. Ed. 203, 205. In this case petitioner was fully aware of the counterclaim item at all times, and indeed originally filed the item in Georgia as the Rule required. What it now argues is that it should be permitted to thereafter survey the situation, balance the relative advantages of holding the item back in Georgia and advancing it in Tennessee, and then proceed accordingly. Petitioner was no doubt aware that the suit in Georgia involved much larger sums, and that it already had a counterclaim there of some $70,000, without this item of $35,000. It was also no doubt aware that in Tennessee the contract price itself was only for $50,000; and that without some kind of a counterclaim there was no likely defense to the Tennessee suit. Counsel for petitioner decided to take a calculated risk. In the middle of the Georgia proceedings he deleted the item in question from the proof, so that he could use it, as he then hoped, to defeat the Tennessee claim *in toto*. His testimony is that he knew that he could continue to press the item in Georgia, but that, "I came to the conclusion that I could better assert it up here."

(R. 18) He said, "* * * when I was trying to decide this issue, I was trying to do what was legally correct for my client." (R. 18) He said he reached his decision sometime between April of 1957 and August of 1958 (R. 143). It should be borne in mind, in this connection, that judgment was originally entered for respondent on the basis of the jury verdict in Georgia on March 18, 1959 (R. 44), and it was not until five months later on August 18, 1959, that the item in question was clearly introduced into the Tennessee proceedings in the form of an amended counterclaim in that case (R. 8). His client testified that the decision to transfer the item to Tennessee was the decision of his attorney, and his alone. (R. 14) Principles of equity are in no way involved here; this was a palpable legal maneuver, executed by counsel for petitioner, and at this juncture the case should be judged with this in mind. If credit was not received for the item in Georgia, it is only because counsel decided or gambled that the item had greater possibilities in Tennessee.

But even now all is not lost for petitioner in the Georgia case. A review of the current proceedings there would seem to be in order: Along with a motion N.O.V., respondent filed a motion for a new trial on its main case, and on the counterclaim, in the Georgia proceeding, immediately after judgment was entered for respondent on March 18, 1959. Action on these motions was held in abeyance by the Georgia Court. The jury in the Tennessee proceeding brought in a special verdict that was also favorable to respondent on October 6, 1959. (R. 2) On December 30, 1959, the Georgia Court issued an opinion stating it would grant petitioner's motion N.O.V., but it expressly reserved decision on the motion for a new trial on the counter-

claim. (R. 168) The judgment of the Tennessee Court entering judgment for petitioner (on the strength of the counterclaim) was entered on March 16, 1960. (R. 2) This judgment was reversed by the Court of Appeals for the Sixth Circuit on August 3, 1961; and rehearing was denied on August 30, 1961. (R. 182)

On September 1, 1961, the Georgia Court granted petitioner's motion for a new trial on the counterclaim in the Georgia case. (Exhibit "A" attached hereto) Certiorari to this Court was applied for on November 27, 1961, and was granted on January 22, 1962.

On March 2, 1962, petitioner in the Georgia proceeding filed a motion to amend the reinstated counterclaim by expressly and specifically claiming the item of $35,000. (Exhibit "B" attached hereto) On the same date it filed a motion for summary judgment on the counterclaim, as so amended. (Exhibit "C" attached hereto) Under date of August 2, 1962, the Georgia Court set these motions, and other matters pertaining to the revived counterclaim down for pre-trial hearing on August 10, 1962. This pre-trial hearing has since been postponed to a date to be hereafter fixed. (Exhibit "D", attached hereto)

The item of $35,000 has been re-introduced into the Georgia case. The amendment to the counterclaim (Exhibit "B" attached) expressly alleges that Atlas Supply Company has been paid "the sum of $35,000 in settlement of its claim against defendant on account of materials furnished to plaintiff at *Fort Benning, Georgia,* and Fort Campbell, Kentucky * * *." (Italics supplied) And the motion for summary judgment (Exhibit "C", attached) describes the cancelled check for $35,000 that was given for materials furnished at

both Benning and Campbell; an affidavit attached to the motion contains the following:

> "Deponent further says that Atlas Supply Company claimed an indebtedness by Pickard to it for materials at Fort Benning, Georgia, for use in the performance of subcontracts involved in the captioned case, in the sum of $104,000.00, and at Fort Campbell, Kentucky, in the sum of $34,520.00, prior to Pickard's default, which said indebtedness Atlas Supply Company claimed to be a liability of Southern Construction Co., Inc. under the provisions of law. Deponent further says that Southern Construction Co., Inc. settled all of said claims for the sum of $35,000.00 and paid the same by a check, a copy of which check after cancellation is attached hereto and marked Exhibit "A", and that Atlas Supply Company executed, in exchange therefor, a release, a copy of which is attached hereto and marked Exhibit "B".

In the light of the foregoing it is difficult to sympathize with the argument that petitioner should be allowed the benefit of the counterclaim item in Tennessee, since it was denied the opportunity to use it in Georgia; and it is especially difficult to accept the proposition that the payment was made for the settlement of the Fort Campbell account alone, and that no part was intended for the Benning account, because the Benning account was in dispute.

It may be the Court will feel that current developments in the Georgia proceedings have rendered this appeal moot.

CONCLUSION

It is requested that the judgment of the Court of Appeals for the Sixth Circuit be affirmed.

EDWARD GALLAGHER
500 Federal Bar Building
Washington 6, D. C.
Attorney for Respondent

Of Counsel:

GRACEY, BUCK, MADDIN & COWAN
434 Stahlman Building
Nashville 3, Tennessee

Dated at Washington, D. C., September 24, 1962.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

Civil Action No. 652

THE UNITED STATES OF AMERICA for the use of SAMUEL J. PICKARD, doing business as PICKARD ENGINEERING COMPANY, 6230 Third Street, Northwest, Washington, D. C., *Plaintiff*

v.

SOUTHERN CONSTRUCTION CO., INC., Old Savannah Road, Augusta, Georgia, and CONTINENTAL CASUALTY COMPANY, *Defendants*

Order Granting Defendants' Motion For New Trial On Defendants' Counterclaim

In this Miller Act suit the plaintiff sought to recover from Southern, the prime contractor, and its surety, $120,000.00, contending, among other things, that the defendant Southern had breached plaintiff's subcontract with Southern by failing to make payments when due and by expelling plaintiff from the job and procuring another to perform services called for by said subcontract. The defendants contended, among other things, that the plaintiff had breached its subcontract by failure to perform and actually by abandoning the work thereby necessitating Southern's completion of the unfinished work at a cost of $70,384.78 over and above the subcontract price, and by a counterclaim Southern sought recovery of said $70,384.78.

After a lengthy trial the jury awarded plaintiff $24,369.40. Thereupon the two defendants, Southern and surety, filed their motion; first, to set aside the verdict and judgment and to enter judgment in their favor on the main case in accordance with the motion for directed verdict made by the defendants at the close of all the testimony on

the grounds as stated in said motion for directed verdict; and, second, in the alternative, to set aside the verdict and judgment and grant defendants a new trial on the main case, and Southern moved separately "to set aside the verdict and judgment thereon as to its counterclaim upon all the foregoing grounds set forth in defendants' motion for new trial on the main case and on the further ground that, if either a judgment notwithstanding the verdict or a new trial is granted on the main case, as a matter of law, a new trial must be had on the counterclaim."

After carefully considering the motion for judgment notwithstanding the verdict, this court entered a memorandum opinion on December 30, 1959 setting forth the reasoning by which it arrived at the conclusion that said motion should be granted, and an order was entered March 31, 1960 granting said motion notwithstanding the verdict, reciting in said order, "the court expressly determines that there is no just reason for delay in the entry of a final judgment for the defendants on the main case and expressly directs the entry of such final judgment. The court makes no ruling at this time on the defendants' motion for new trial on the main case nor on the defendants' motion for new trial on the counterclaim." Counsel for the defendant-movant had requested of the court that the motion for new trial on the counterclaim be held in abeyance pending the disposition of a companion case between the same parties in a District Court of the United States in Tennessee. Only recently counsel for movant has invited a ruling on said motion for new trial on the counterclaim.

This motion is strenuously opposed by counsel for plaintiff, both as to its merits and upon the ground that Southern, by making a motion for judgment notwithstanding the verdict and obtaining a favorable ruling thereon, has waived any rights it might have to a new trial on its counterclaim, and that, as a matter of law, under the Rules of Civil Procedure the court, having entered a judgment notwithstanding the verdict, that is a final judgment which disposes of

the entire case, both the plaintiff's original claim and the defendant's counterclaim. This court does not so interpret the rules or the decisions. See *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956) and *Cold Metal Process Co.* v. *United Co.*, 351 U.S. 445 (1956). As was said by the Court of Appeals for the Fourth Circuit in the somewhat analogous case, *Town of Clarksville, Va.* v. *United States*, 198 F. 2d 238 (1952), such a construction of Rule 54(b) would be "a hypertechnical interpretation not in accord with its manifest spirit and purpose."

It is very probably true that the jury, having decided for the plaintiff in the main case, gave no consideration at all to the defendant's counterclaim. Indeed, if their verdict for the plaintiff in the main case were a proper verdict a failure to give consideration to defendant's counterclaim would also be proper. By the same token, inasmuch as their verdict for the plaintiff in the main case was an improper verdict (for the reasons set forth in said memorandum opinion) their failure to give consideration to defendant's counterclaim was likewise improper. And now that the verdict has been set aside the defendant's counterclaim remains undisposed of.

If, on the other hand, it could be said that as a matter of law the verdict which the jury rendered is tantamount to a finding by the jury against the defendant's counterclaim on its merits the answer is that said finding cannot be approved by the court because it is contrary to law, contrary to the evidence, and is decidedly and strongly against the weight of the evidence and without evidence to support it. In any and all events therefore, as the court sees it, the defendant Southern is entitled to a new trial upon its counterclaim. This will leave the parties in a situation somewhat comparable to the status of the parties in another Miller Act case originating and still pending in this court, *United States of America* v. *James Carter Taylor*, — F. 2d —, (5th Cir. July 26, 1961). In each case the plaintiff has had its half inning at bat, has retired scoreless and must now give the defendant its turn at bat.

In the instant case after the entry of this order the posture of the case will be quite analogous to what it would have been if the court had granted the defendants' motion for directed verdict at the conclusion of the plaintiff's evidence and had then proceeded with the trial solely upon the counterclaim.

Accordingly, Southern's motion for new trial on its counterclaim is hereby granted, the verdict insofar as it may relate to said counterclaim is hereby set aside and a new trial solely upon said counterclaim is hereby ordered.

So Ordered, this 1st day of September, 1961.

/s/ W. A. Bootle
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

Civil Action No. 652

The United States of America for the use of Samuel J. Pickard, doing business as Pickard Engineering Company, 6230 Third Street, Northwest, Washington, D. C., *Plaintiff*

v.

Southern Construction Co., Inc., Old Savannah Road, Augusta, Georgia, and Continental Casualty Company, *Defendants*

Amendment

Comes now the defendant, Southern Construction Co., Inc., in the above entitled cause, and after the grant of a motion for new trial in said cause on the counterclaim of the defendant, moves to amend said counterclaim as follows:

By striking paragraph 3 of said counterclaim and the prayers thereof in their entirety, and substituting in lieu thereof the following:

"3. Defendant has paid either to the above-named plaintiff or for the account of plaintiff prior to plaintiff's default the sum of $431,925.90, and has paid to subcontractors and materialmen in order to complete said construction after default by the plaintiff, the sum of $182,289.97, and has paid to Atlas Supply Company the sum of $35,000.00 in settlement of its claim against defendant on account of materials furnished to plaintiff at Fort Benning, Georgia and Fort Campbell, Kentucky, making a total expenditure of $614,215.87, which sum is in excess of the aggregate contract price as finally adjusted of $513,075.11 on all three of said contracts as described in paragraphs 3, 4, and 5 of plaintiff's complaint, and the plaintiff, Samuel J. Pickard, doing business as Pickard Engineering Company, is indebted to this defendant, Southern Construction Co., Inc., at the present time for the excess of $101,140.76."

WHEREFORE, defendant demands judgment against plaintiff, Samuel J. Pickard, doing business as Pickard Engineering Company, on its counterclaim in the amount of $101,140.76 plus interest and costs.

HARRY S. MCCOWEN

Address:
2634 Bank of Georgia Bldg.,
Atlanta, Georgia

HULL, WILLINGHAM, TOWILL & NORMAN

Address:
10th Floor, Southern Finance
Building, Augusta, Georgia

FOLEY, CHAPPELL, YOUNG & HOLLIS

Address:
The Fourth National Bank
Building, Columbus, Georgia

By HOWELL HOLLIS

I, Howell Hollis, of Counsel for Southern Construction Co., Inc., one of the defendants in the above entitled cause, do hereby certify that I have served the plaintiff, Samuel J. Pickard, doing business as Pickard Engineering Company, with a copy of the foregoing amendment by mailing a copy of the same postpaid to his Counsel of Record, Messrs. Martin, Snow & Grant, 503 First National Bank Building, Macon, Georgia, and Mr. Edward Gallagher, 1216 Wyatt Building, Washington 5, D. C.

This 2nd day of March, 1962.

HOWELL HOLLIS
Of Counsel for the Defendant,
Southern Construction Co., Inc.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

Civil Action No. 652

THE UNITED STATES OF AMERICA for the use of SAMUEL J. PICKARD, doing business as PICKARD ENGINEERING COMPANY, 6230 Third Street, Northwest, Washington, D. C., *Plaintiff*

v.

SOUTHERN CONSTRUCTION CO., INC., Old Savannah Road, Augusta, Georgia, and CONTINENTAL CASUALTY COMPANY, *Defendants*

Motion For Summary Judgment On Its Counterclaim By Defendant, Southern Construction Co., Inc.

The defendant, Southern Construction Co., Inc., moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment on a counterclaim heretofore filed by it as now amended, on the ground that there is no genuine issue as to any material fact, and that

the defendant is entitled to a judgment in its favor as to said claim.

. . . . .

2. The sworn affidavit of Mary L. Senn, hereto attached, shows that defendant Southern after default by plaintiff Pickard, incurred costs and paid to complete said work the total sum of $147,289.97, plus $35,000.00 paid to Atlas Supply Company in settlement of its claims against Southern Construction Company arising out of Pickard's accounts at Fort Benning, Georgia and Fort Campbell, Kentucky, . . .

. . . . .

ADDITIONAL PAYMENT TO ATLAS SUPPLY COMPANY

(a) Cancelled check from Southern Construction Company to Atlas Supply Company in the amount of $35,000.00 for materials furnished to Fort Benning and Fort Campbell, accepted in full settlement and satisfaction of all claims against Southern by Atlas, copy of which is attached as "Exhibit A" to the affidavit of Mary L. Senn which is attached to this motion.

(b) Release executed by Atlas Supply Company to Southern Construction Company acknowledging the payment of $35,000.00 in settlement of Pickard's accounts at Fort Benning, Georgia, and Fort Campbell, Kentucky, a copy of which is attached as "Exhibit B" to the affidavit of Mary L. Senn which is attached to this motion.

(c) Opinion of the Sixth Circuit Court of Appeals, decided August 3, 1961, and published in 293 Federal Reporter, 2nd Series at page 493.

(d) Copy of reply brief on behalf of Pickard in the United States Court of Appeals for the Sixth Circuit, hereto attached as "Exhibit C" to this motion.

Total additional amount paid to Atlas by Southern, as per cancelled check $35,000.00

. . . . .

This motion is further based upon the affidavits of R. J. Baxter, Mary L. Senn, J. T. Bryan, Jr., J. O. Hutchinson, and L. W. Proctor previously filed in this cause on the motion for summary judgment on its counterclaim by defendant Southern Construction Co., Inc. prior to the trial of said cause.

This motion is further based upon the affidavit hereto attached of Mary L. Senn.

• • • •

HARRY S. MCCOWEN

Address:
2634 Bank of Georgia Bldg.
Atlanta 3, Georgia

HULL, WILLINGHAM, TOWILL & NORMAN

Address:
10th Floor, Southern Finance
Building, Augusta, Georgia

FOLEY, CHAPPELL, YOUNG & HOLLIS

Address:
The Fourth National Bank
Columbus, Georgia

By HOWELL HOLLIS /s/

• • • •

AFFIDAVIT

STATE OF GEORGIA,
COUNTY OF RICHMOND.

Personally appeared before the undersigned, Mary L. Senn who, being duly sworn, deposes and says as follows:

Deponent is bookkeeper and office manager of Southern Construction Company, Inc. and, in that capacity, is in charge of the books and records of said Company.

• • • •

Deponent further says that Atlas Supply Company claimed an indebtedness by Pickard to it for materials at

Fort Benning, Georgia, for use in the performance of subcontracts involved in the captioned case, in the sum of $104,000.00, and at Fort Campbell, Kentucky, in the sum of $34,520.00, prior to Pickard's default, which said indebtedness Atlas Supply Company claimed to be a liability of Southern Construction Co., Inc. under the provisions of law. Deponent further says that Southern Construction Co., Inc. settled all of said claims for the sum of $35,000.00 and paid the same by a check, a copy of which check after cancellation is attached hereto and marked Exhibit "A", and that Atlas Supply Company executed, in exchange therefor, a release, a copy of which is attached hereto and marked Exhibit "B".

MARY L. SENN /s/

Sworn to and subscribed before me this 14th day of February, 1962.

MOLLY ROBERTSON

Notary Public, Richmond County, Georgia.
(Seal)

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON, GEORGIA

August 2, 1962

Mr. Howell Hollis
Columbus, Georgia

Mr. Robert G. Norman
Augusta, Georgia

Mr. George C. Grant
Macon, Georgia

Mr. Harry S. McCowen
Atlanta, Georgia

Mr. Edward Gallagher
Washington 5, D. C.

Gentlemen:

Re: Pickard Engineering Co. v. Southern Construction Co., Civil Action No. 652, Columbus, Division

I would like to pre-try the remaining issues in the above case as soon as suits the convenience of counsel. Please consider this letter as if it embodied the usual pre-trial notice. That means that you gentlemen should confer and agree as far as possible with respect to the remaining issues in this case, and prepare a proposed pre-trial order covering such agreements as you are able to accomplish.

My present thinking is that the motion to dismiss the pending motion for summary judgment will have to be overruled, and that in my view of the response to that motion, supported by Mr. Pickard's affidavit, the counterclaim probably can not be fully adjudicated on the motion. At the pre-trial, however, we should undertake to ascertain what material facts exist without substantial controversy and what material facts, if any, are actually and in good faith controverted.

May I suggest the following possible areas of agreement: Can it be agreed that in completing the work Southern made all of the expenditures listed in the motion, and does the controversy boil down only to whether or not, and to what extent, such expenditures were reasonable and necessary? Perhaps there is no contention at all with respect to the Hecht Company item of $1519.28. Perhaps the $35,000.00 Atlas item presents no factual but only a legal question. Apparently, it is agreed that the total contract price was $513,075.11, and that there was paid to Pickard, or for his benefit, prior to cessation of work $431,925.90.

Other areas of possible agreement will doubtless occur to you gentlemen.

I shall be glad to hear from you at the proposed pre-trial conference both on the pending motions and to learn the results of your pre-trial efforts.

I am setting this pre-trial for August 10th, in Macon, at 2:30 p.m., and trust that this will suit your convenience.

Very truly yours,

W. G. Bootle
United States Judge

WAB:e
cc: Mr. John P. Cowart, Clerk

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 46.

SOUTHERN CONSTRUCTION COMPANY, INC., and
CONTINENTAL CASUALTY COMPANY,
Petitioners,

vs.

UNITED STATES for the Use of SAMUEL J. PICKARD,
d/b/a PICKARD ENGINEERING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR THE PETITIONERS.

CHARLES C. TRABUE, JR.,
Nashville 3, Tennessee,
Attorney for Petitioners.

Of Counsel:
TRABUE, MINICK, STURDIVANT & HARBISON,
26th Floor, Life & Casualty Tower,
Nashville 3, Tennessee,
HULL, WILLINGHAM, TOWILL & NORMAN,
Southern Finance Building,
Augusta, Georgia,
HARRY S. McCOWEN,
2634 Bank of Georgia Building,
Atlanta, Georgia.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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Rules Cited.

Federal Rules of Civil Procedure:

Rule 8 (c) 2, 6

Rule 13 (a) 1, 2, 3, 4-5, 6

IN THE

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OCTOBER TERM, 1962.

No. 46.

SOUTHERN CONSTRUCTION COMPANY, INC., and CONTINENTAL CASUALTY COMPANY,
Petitioners,

vs.

UNITED STATES for the Use of SAMUEL J. PICKARD, d/b/a PICKARD ENGINEERING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR THE PETITIONERS.

QUESTION PRESENTED AND STATEMENT OF THE CASE.

The real question here presented for determination by this Court is whether or not the compulsory provisions of Rule 13 (a) of the Federal Rules of Civil Procedure apply to a situation where the plaintiff has brought two separate suits against a single defendant in two separate jurisdictions and on two separate contracts.

We cannot believe that it was one of the beneficent purposes of the Federal Rules of Civil Procedure, including Rule 13 (a), to deprive a defendant of the right to defend against such separate suits in accordance with the facts underlying payments and in complete disregard of the principles of equity and justice.

It is the contention of petitioners that Rule 13 (a) was never intended to apply to a fact situation as presented by this record, and that in fact Rule 8 (c) of the Federal Rules of Civil Procedure would allow the Court "on terms, if justice so requires," to "treat the pleading as if there had been a proper designation," which in this instance involves simply the defensive plea of payment.

The only deliberate action taken under the facts before this Court was the deliberate act of the respondent in first filing all of his suits in the Georgia Court, which had no jurisdiction of the Tennessee claims, and thereafter on its own initiative respondent, the **plaintiff** in the Trial Court, separated its claims and filed a separate suit in the Tennessee court. Requiring petitioners under such circumstances to litigate all of their defenses in the Georgia case and stand silent in the Tennessee case subsequently filed by the respondent, is on its face illogical and inequitable.

Respondent quotes the Advisory Committee note at the time Rule 13 (a) was amended in 1948, which shows the real purpose of Rule 13 (a) was to prevent **"bringing an independent action in another court"** by a party having a claim (Respondent's Brief, p. 12). No independent action has been brought by the petitioners in this cause within the purview of the Advisory Committee note. On the contrary, a second action was instituted by the respondent in Tennessee, not by petitioners, who were seeking to assert their defenses to the separate suits filed by respondent.

STATUS OF THE RECORD.

Respondent's brief begins and ends on the theme that petitioners may still have another available remedy by reasserting in the Georgia case the item of $35,000, which is the real subject matter of the litigation here involved. Respondent has gone so far as to attach as Appendices B, C, and E, the action taken in the Georgia suit subsequent to the rendition of the decision by the Sixth Circuit Court of Appeals.

His plea to this Court seems to be that even though the Sixth Circuit Court of Appeals may be wrong in its application of Rule 13 (a), nevertheless petitioners should be required to reassert this claim in the Georgia case, to go to the expense of litigating the matter before a jury in the Georgia case, and to subject itself to a possible appeal in the Georgia case, perhaps even up to this Court. Furthermore, since the decision by the Sixth Circuit, respondent has obtained judgment in the Tennessee case, and the trial Judge has granted a stay of execution but has required petitioners to post a bond to protect the judgment as handed down by the Sixth Circuit. To require petitioners to litigate for another year, or perhaps two years, in the Georgia action, with the premium expense of such a bond, is unnecessary and unjust, when a ruling favorable to petitioners by this Honorable Court construing Rule 13 (a), would vacate such judgment and eliminate such expense to your petitioners.

Respondent ends his brief with the suggestion that this Court will feel that current developments in the Georgia proceedings "have rendered this appeal moot".

Petitioners most earnestly submit that this is misleading, inequitable, and unjust, and is not a matter of record before this Court. Respondent has seen fit to include as ap-

pendices and in his argument matters of pleading in the Georgia case filed subsequent to the rendition of the decision by the Sixth Circuit, but he has completely failed to point out to this Court that on August 4, 1962, **respondent's associate counsel in Georgia asked that the pre-trial hearing and the trial in Georgia be delayed until the Tennessee case was decided by the Supreme Court.** (See Appendix A attached hereto.)

In one breath in the Georgia case respondent asks for delay until the matter can be heard in this Honorable Court; in the next breath he asks this Court to consider the issue moot since pleadings have been filed to protect this item in the Georgia Court in the event of an adverse ruling by this Honorable Court.

Furthermore, it is evident from the legal position taken by the respondent before this Court, that should the decision of the Court of Appeals be affirmed respondent will take the legal position in the Georgia case that since Southern deleted the item from the Georgia case upon the filing of the Tennessee suit by the respondent, it is now res adjudicata and cannot now be asserted in the Georgia case. Such an issue in the Georgia case could conceivably be litigated through the Circuit Court of Appeals and ultimately would again be before this Court for decision. The petitioners earnestly submit that they are entitled to have the issue determined now so as to avoid such delay, uncertainty and expense.

The mere fact that petitioners have amended their pleadings in the Georgia case to protect against a possible affirmance of the Sixth Circuit, should not prevent them from receiving a full measure of justice in the Tennessee case, which is before this Court for decision. Indeed, the ruling of the Sixth Circuit Court of Appeals is not only unjust and inequitable as to these petitioners, but is a matter of such import in the application of Rule

13 (a) of the Federal Rules of Civil Procedure, that it should not be allowed to stand as a part of the case law of the United States and thereby encourage additional litigation by plaintiffs under similar fact circumstances as are here involved.

This is a case of first impression and we respectfully submit that a ruling by this Court is not only urgently required to do justice to the rights of the petitioners, but is of great import in the proper interpretation and application of one of the very important rules of Federal Civil Procedure, designed to promote justice, the speedy determination of legal issues, and the elimination of technical issues such as are here involved.

We cannot believe that is the purpose of Rule 13 (a) to allow a plaintiff to file a suit and thereafter at his discretion delete a part of his initial suit, file it elsewhere, and thereby deprive the defendant of the right to defend the second suit on its facts.

The basic purpose and spirit of Rule 13 (a) is to prevent multiplicity of litigation. The petitioners here have not multiplied litigation. Only the respondent has done so.

It is undisputed that upon the trial of the Georgia case respondent introduced sworn exhibits listing all of the payments made by petitioner Southern at Fort Benning. Respondent did not include this $35,000 payment (R. 109, 474; P. Ex. 32, R. 22-23); nor did petitioner Southern. Respondent, on the contrary, stood silent and made no contention at the trial of the Georgia case that this item was a compulsory counterclaim in the Georgia case, even though respondent had full knowledge of this payment and all of the circumstances surrounding it, including even a copy of the check mailed by Southern to respondent's supplier.

In both the Georgia case and the Tennessee case the respective District Judges ruled that respondent, as a matter

of law, was not entitled to recover against your petitioner. Respondent at the time of the trials in Georgia and in Tennessee was insolvent. The payment of the $35,000 is asserted in the Tennessee case as an affirmative defense, and no affirmative judgment over against respondent is sought.

Under such circumstances the compulsory provisions of Rule 13 (a) do not apply, but Rule 8 (c) does apply.

Respectfully submitted,

CHARLES C. TRABUE, JR.,
Nashville 3, Tennessee,
Attorney for Petitioners.

Of Counsel:

TRABUE, MINICK, STURDIVANT & HARBISON,
26th Floor, Life & Casualty Tower,
Nashville 3, Tennessee,

HULL, WILLINGHAM, TOWILL & NORMAN,
Southern Finance Building,
Augusta, Georgia,

HARRY S. McCOWEN,
2634 Bank of Georgia Building,
Atlanta, Georgia.

APPENDIX A.

T. Baldwin Martin
Cubbedge Snow
George C. Grant
Hendley V. Napier
T. Baldwin Martin, Jr
Cubbedge Snow, Jr

Charles M. Culver

Law Offices
Martin, Snow, Grant & Napier
503 First National Bank
Building
Macon, Georgia

Fred R. Martin
(1890-1949)

August 4, 1962

Hon. W. A. Bootle
United States Judge
Federal Building
Macon, Georgia

Dear Judge Bootle:

Re: Pickard Engineering Company vs
Southern Construction Company
Civil Action No. 652
Columbus Division

This will acknowledge receipt of your letter of August 2 addressed to all counsel with reference to a proposed pretrial conference for 2:30 P. M. on August 10 in Macon.

As you know, in the companion case in the Middle District of Tennessee, the trial judge held that the $35,000.00 payment to Atlas could be used as a counterclaim to the Tennessee suit, but this ruling was reversed by the Sixth Circuit Court of Appeals, which held that this payment was a compulsory counterclaim in the Columbus suit. A judgment was then taken in the Tennessee trial court for the amount of indebtedness to Pickard by Southern found by the jury without allowing any credit for this payment.

Thereafter, Southern filed a petition in the Supreme Court of the United States for certiorari to review the Sixth Circuit decision, and certiorari was granted and the case is to be argued in and decided by the Supreme Court.

It occurs to me that no satisfactory trial of the counterclaim in the Columbus case can be had until the Supreme Court renders its decision. If the Supreme Court should reverse the Sixth Circuit decision and reinstate the trial court judgment, then Southern would have acquired full benefit of the $35,000.00 payment and would not be entitled to make any claim for it in the Columbus suit. On the other hand, if the Sixth Circuit decision should be affirmed by the Supreme Court, then naturally Southern would want to claim the entire $35,000.00 payment in the Columbus counterclaim.

It therefore is my suggestion that the pretrial conference and the trial itself should be stayed until a decision has been rendered by the Supreme Court. In view of these circumstances, it is my belief that opposing counsel would concur in this suggestion. I am sending copies of this letter to them with the request that they immediately notify the court and me of their wishes in this connection.

Yours very truly,

George C. Grant.

GCG/mh

cc: Mr. Howell Hollis,
Mr. Robert Norman,
Mr. Harry McCowen,
Mr. Edward Gallagher.